DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-1121
Title: Dianne Knox, et al., Petitioners
v.
Service Employees International Union, Local 1000
Docketed: March 14, 2011
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (08-16645)
Decision Date: December 10, 2010
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Mar 10 2011	Petition for a writ of certiorari filed. (Response due April 13, 2011)
Mar 28 2011	Waiver of right of respondent California State Controller John Chiang to respond filed.
Mar 30 2011	Order extending time to file response to petition to and including May 13, 2011.
May 13 2011	Brief of respondent Service Employees International Union, Local 1000 in opposition filed.
May 24 2011	DISTRIBUTED for Conference of June 9, 2011.
May 24 2011	Reply of petitioners Dianne Knox, et al. filed. (Distributed)
Jun 13 2011	DISTRIBUTED for Conference of June 16, 2011.
Jun 20 2011	DISTRIBUTED for Conference of June 23, 2011.
Jun 27 2011	Petition GRANTED.
Jul 8 2011	The time to file the joint appendix and petitioners' brief on the merits is extended to and including August 26, 2011.
Aug 11 2011	The time to file respondent's brief on the merits is extended to and including October 26, 2011.
Aug 19 2011	The time to file the joint appendix and petitioners' brief on the merits is further extended to and including September 12, 2011.
Aug 19 2011	The time to file respondent's brief on the merits is further extended to and including November 10, 2011.
Sep 12 2011	Joint appendix filed. (Statement of costs received.)
Sep 12 2011	Brief of petitioners Dianne Knox, et al. filed.
Sep 15 2011	Brief amici curiae of Pacific Legal Foundation, et al. filed.
Oct 3 2011	Motion to dismiss as moot filed by respondent Service Employees International Union, Local 1000.
Oct 6 2011	Extension of time to file response to the motion to dismiss as moot to and including October 24, 2011.

Oct 17 2011	Supplemental appendix of respondent in support of motion to dismiss as moot filed.
Oct 24 2011	Petitioners' opposition to respondent's motion to dismiss as moot filed. filed. (Distributed)
Oct 25 2011	The time to file respondent's brief on the merits is further extended to and including November 21, 2011.
Oct 26 2011	Respondent's reply to opposition to motion to dismiss as moot.
Nov 7 2011	Further consideration of respondent's motion to dismiss as moot is deferred to the hearing of the case on the merits.
Nov 14 2011	SET FOR ARGUMENT ON Tuesday, January 10, 2012.
Nov 15 2011	CIRCULATED.
Nov 18 2011	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Nov 21 2011	Brief of respondent Service Employees International Union, Local 1000 filed. (Distributed)
Nov 28 2011	Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed. (Distributed)
Nov 28 2011	Brief amicus curiae of National Education Association filed. (Distributed)
Dec 2 2011	Record received from U.S.D.C. for Eastern District of Califoria. (1 box)
Dec 21 2011	Reply of petitioners Dianne Knox, et al. filed. (Distributed)
Jan 10 2012	Argued. For petitioners: William J. Young, Springfield, Va. For respondents: Jeremiah Collins, Washington, D. C.

PETITION
FOR
WRIT OF
CERTIORARI

FILED

No. 10-___101121 MAR 10 2011

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DIANNE KNOX; WILLIAM L. BLAYLOCK;
ROBERT A. CONOVER; EDWARD L. DOBROWOLSKI, JR.;
KARYN GIL; THOMAS JACOB HASS; PATRICK JOHNSON;
AND JON JUMPER, ON BEHALF OF THEMSELVES
AND THE CLASSES THEY REPRESENT,
Petitioners,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 1000,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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March 2011

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QUESTIONS PRESENTED

1. In *Teachers Local No. 1 v. Hudson*, this Court held that "[b]asic considerations of fairness, as well as concern for the First-Amendment rights at stake, . . . dictate that the potential objectors be given sufficient information to gauge the propriety of the union's [agency] fee" extracted from nonunion public employees. 475 U.S. 292, 306 (1986).

May a State, consistent with the First and Fourteenth Amendments, condition employment on the payment of a special union assessment intended solely for political and ideological expenditures without first providing a *Hudson* notice that includes information about that assessment and provides an opportunity to object to its exaction?

2. In *Lehnert v. Ferris Faculty Ass'n*, this Court held that "the State constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation." 500 U.S. 507, 522 (1991) (opinion of Blackmun, J.); *accord id.* at 559 (opinion of Scalia, J.) (concurring as to "the challenged lobbying expenses").

May a State, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of union agency fees for purposes of financing political expenditures for ballot measures?

PARTIES TO THE PROCEEDINGS BELOW

Defendant Service Employees International Union, Local 1000, was identified by its earlier name—California State Employees Association, Local 1000, Service Employees International Union, AFL-CIO, CLC—in the caption of the original Complaint. Record ("R.") 1. Its correct name is stated in the caption herein.

In addition to the parties listed in the caption, the other parties to the proceedings below were:

1. The Controller of the State of California (in his official capacity only). Steve Westly held that office at the outset of this case, and the office is currently held by John Chiang, automatically substituted as a Defendant pursuant to Rule 25(d)(1), FED. R. CIV. P.; and

2. R. Paul Ricker, an individual, who was originally named as a Plaintiff herein, and was dismissed upon stipulation of the parties. R. 43.

CORPORATE LISTING

Because no Petitioner is a corporation, no corporate disclosure statement is required under Supreme Court Rule 29.6.

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IN THE

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DIANNE KNOX; WILLIAM L. BLAYLOCK;
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioners Dianne Knox, William L. Blaylock, Robert A. Conover, Edward L. Dobrowolski, Jr., Karyn Gil, Thomas Jacob Hass, Patrick Johnson, and Jon Jumper, for themselves and the classes they represent ("the Nonmembers"),[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on 10 December 2010.

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[1] While the captions on the reported decisions use the phrase "and the class they seek to represent," the district court certified the Nonmembers as representatives of two classes of nonunion employees: those who objected to Local 1000's 2005 *Hudson*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, Appendix ("App.") A, *infra* 1a, is reported at 628 F.3d 1115 (9th Cir. 2010). The decision of the United States District Court for the Eastern District of California, App. B, *infra* 50a, granting in part Plaintiffs' Motions for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment, is not reported but appears at 2008 WL 850128, 183 L.R.R.M. (BNA) 3232 (E.D. CAL. 2008).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on 10 December 2010. This petition is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The notifications required by Rule 29.4(b) have been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution. *See* Apps. C & D, *infra* 75a & 76a. This case also involves the provisions of the Ralph C. Dills Act, CAL. GOV'T CODE § 3512 *et seq.*, and specifically § 3513(k) and § 3515 thereof. *See* App. E, *infra* 77a.

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notice ("objectors") and those who did not ("nonobjectors"). R. 81, *reported as Knox v. Westly*, 2006 WL 3147683 (E.D. CAL. 2006). The distinction between the two sub-classes is not material to this Petition.

STATEMENT OF THE CASE

In *Teachers Local No. 1 v. Hudson*, this Court unanimously held that "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. 292, 310 (1986).

The first Question Presented addresses whether *Hudson* requires an independent or supplemental notice and opportunity to object when a union—after promulgating its normal annual *Hudson* notice for regular dues—imposes a temporary special assessment designated solely or primarily "for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities." App. B at 53a.

In *Lehnert v. Ferris Faculty Ass'n*, this Court limited union political and lobbying expenditures to those for the "ratification or implementation of a dissenter's collective-bargaining agreement." 500 U.S. 507, 520 (1991) (opinion of Blackmun, J.); *accord id.* at 559 (opinion of Scalia, J.) (concurring as to "the challenged lobbying expenses").

Lehnert thus decided the second Question Presented contrary to the Ninth Circuit's ruling here, *i.e.*, whether the First and Fourteenth Amendments are violated when a state and union force nonunion public employees to subsidize a labor union's political activities regarding ballot measures.

I. THE FACTS

The Nonmembers are 28,000 current and former public employees of the State of California who are represented by the named Petitioners. They are not or were not members of the labor organization designated as their monopoly bargaining representative, Respondent Service Employees International Union, Local 1000. The Nonmembers are required by California statute and the monopoly bargaining agreements governing their terms and conditions of employment to pay to Local 1000 a "fair share fee . . . used to defray the costs incurred by the recognized employee organization in fulfilling its duty to represent the employees in their employment relations with the state." CAL. GOV'T CODE § 3513(k); App. E at 77a.

During June 2005,[2] Local 1000 sent a notice ("the *Hudson* Notice") to the Nonmembers. That notice set the agency fee to be seized from 1 July 2005, through 30 June 2006 ("2005-06 fiscal year"), at 99.1% of full union dues, but informed the Nonmembers that a reduced agency fee of 56.35% of Local 1000's annual dues would be charged to nonmembers who objected within thirty days. However, "[t]his notice did not indicate that a temporary assessment would be included in the 2005-06 dues and fees, but stated instead that '[d]ues are subject to change without further notice to fee payers.'" App. B at 52a-53a.

On or about 30 July, Local 1000's Budget Committee proposed an "Emergency Temporary Assessment to Build a Political Fight-Back Fund." It was intended to be "used for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California." Record ("R.") 1 at 15; *accord* App. A at 4a; App. B at 53a. Local 1000 specified that "the fund 'will not be used for regular costs of the union—such as office rent, staff salaries or routine equipment replacement.'" App. A at 5a-6a & 27a; 628 F.3d at 1118-19 & 1128. The assessment was approved by Local 1000 on or about 27 August, *effective 1 September.*[3]

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[2] Unless otherwise noted, all dates referenced are for the year 2005.

Deduction of the assessment began with the September paychecks issued to State employees. With the money garnered from its assessment, Local 1000 *expended funds for political activities in relation to* various Propositions placed on the November ballot in California.

Local 1000's 2005 *Hudson* Notice, R. 1, Exhibit C, preceded the proposal to impose the assessment by more than one month, and the vote to impose it by about two months. That *Hudson* notice contained no information that a special assessment solely for political and ideological activities would be imposed during the impending fee year. Local 1000 later reported to the California Secretary of State numerous and substantial political contributions in the months prior to the election for which it imposed its special assessment. R. 99, at 4, lines 14-27.

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[3] *Judge Wallace's dissent pointedly draws attention to the* fact that "shortly after the expiration of the period for objection to the June 2005 *Hudson* notice, the Union's legislative bodies began discussing a temporary dues increase." App. A at 27a, 628 F.3d at 1128.

On or about 31 August, well after the *Hudson* notice's deadline for objecting to paying the full agency fee, Local 1000 sent a letter addressed to "Local 1000 Members and Fair Share Fee Payers." App. B at 53a. That letter announced the imposition of the "temporary dues increase . . . 'to defeat Propositions 76 and 75,' other future attacks on the Union pension plan, and other activities," including "'to elect a governor and legislature who support public employees and the services [they] provide.'" App. A at 6a, 28a; 628 F.3d at 1119, 1129. The letter "did not provide an explanation for the basis of the additional fees being imposed, and it did not provide nonmembers with an opportunity to object to the additional fees." *Id.* at 28a; 628 F.3d at 1129 (Wallace, J., dissenting).

Beginning with wages paid in September, the Nonmembers found that the compulsory fees deducted from their wages increased by approximately 25-33%. App. B at 62a n.6 & 63a n.7. Because the assessment was intended for "a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California," *id.* at 64a, the Nonmembers found themselves giving Local 1000 a forced loan spent on the ballot propositions and other political and nonbargaining activities to which they objected.

II. THE PROCEEDINGS BELOW

On 1 November 2005, the Nonmembers filed this class-action lawsuit alleging that the imposition of the special assessment triggered a duty under *Hudson* to provide a new notice and opportunity to object. It further alleged that Local 1000 and the State of

California were collecting the assessment—which had been "imposed solely for nonchargeable political and ideological purposes, resulting in a forced loan from them that will be spent on the ballot propositions and other political and nonbargaining activities to which they object"—in the absence of "the constitutional requirements for the . . . collection of agency fees," *Hudson*, 475 U.S at 310. R. 1, at 9, ¶ 34.

The Complaint sought declaratory and injunctive relief and equitable restitution for violations of the Nonmembers' rights under the First and Fourteenth Amendments and 42 U.S.C. § 1983. R. 1, at 12-14. Jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343. R. 1, at 2-3, ¶ 5.

After discovery, the trial court rendered its judgment on cross-motions for summary judgment. The district court found that the assessment "represents a material change in the amount of funds nonunion employees were required to contribute to Union expenditures," and that "[i]t is hard to imagine any circumstances in which it could be more clear that an Assessment was passed for political and ideological purposes." The district court, therefore, held that Local 1000's "2005 *Hudson* Notice could not possibly have supplied the requisite information with which nonmembers could make an informed choice of whether or not to object to the Assessment," and that "the 2005 *Hudson* Notice was inadequate to provide a basis for the Union's Assessment." App. B at 63a, 64a, 70a.

The trial court reasoned that adoption of Local 1000's argument that its prior *Hudson* notice was adequate to protect the Nonmembers' rights against its post-notice assessment would leave unions "free to . . . trample on the First-Amendment rights of dissenters." *Id.* at 65a. The court rejected as irrelevant the union's claim that a portion of the assessment was later used for constitutionally-chargeable purposes:

> Following Defendants' reasoning, there could never exist an assessment for purely political purposes because it is quite likely that some small portion of such a fund would, from a practical perspective, always be chargeable. It would follow that all post-notice, post-objection period assessments would be considered dues and fees increases, covered by an already issued *Hudson* notice. Unions would then be permitted to pass any such future assessments as long as those funds built in the most minute chargeable cushion, a cushion that is, from a practical perspective, almost inevitable.

Id.

The district court entered judgment for Plaintiffs, and ordered relief. R. 140: Judgment; R. 159: Amended Judgment.

Local 1000 timely appealed,[4] R. 155 and 161, and a three-judge panel of the United States Court of Appeals for the Ninth Circuit reversed, App. A at 2a-16a; 628 F.3d at 1117-23 (Thomas, J.). Former Chief Judge Wallace dissented vigorously. *Id.* at 16a-49a; 628 F.3d at 1123-39.

The panel majority characterized Local 1000's temporary special assessment as "a temporary, mid-term fee increase," and found it unnecessary for Local 1000 to provide a notice and opportunity to object to the assessment. The majority held that *Hudson*'s "safe-harbor" provisions—requiring a union to base its fee calculation upon "its expenses during the preceding year," 475 U.S. at 307 n.18—adequately protected the Nonmembers' rights. App. A at 2a, 8a-16a; 628 F.3d at 1117, 1120-23.

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[4] California's State Controller did not participate in the appeal.

The panel majority balanced "the right of a union, as the exclusive collective bargaining representative of its employees, to require nonunion employees to pay a fair share of the union's costs" against "the First Amendment limitation on collection of fees from dissenting employees for the support of ideological causes not germane to the union's duties as collective-bargaining agent." *Id.* at 2a; 628 F.3d at 1117.

The panel majority held that the appropriate standard for adjudicating a union's actions in enforcing a forced-unionism agreement is "the normal *Hudson* balancing and reasonable accommodation test we have used in the past when deciding challenges to *Hudson* notice procedures." *Id.* at 9a; 628 F.3d at 1120 (citations omitted).

The panel majority acknowledged Local 1000's internal representations—adopting the assessment—that its purpose was to be "'used for a broad range of political expenses,'" and that "the fund 'will not be used for regular costs of the union—such as office rent, staff salaries or routine equipment replacement.'" *Id.* at 5a-6a; 628 F.3d at 1118-19. Applying its "balancing test," the majority nonetheless reasoned that Local 1000's *post hoc* determination that a portion of the assessment was utilized for chargeable activities justified Local 1000's application to the fund of its fee calculation for the year prior to that in which the "Political Fight Back Fund" was spent. *Id.* at 8a-15a; 628 F.3d at 1120-22.

Former Chief Judge Wallace dissented, criticizing the majority for a lack of fidelity to "the principles guiding th[is] Court's decision" in *Hudson*, "begin[ning] from an inaccurate account of the interests at stake, and appl[ying] the procedures set forth in *Hudson* without due attention to the distinguishing facts of this case." *Id.* at 16a; 628 F.3d at 1123.

Judge Wallace sharply drew attention to two principles he derived from this Court's relevant decisions: (1) this Court's repeated holding barring unions from "collect[ing] from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent," *id.* at 18a; 628 F.3d at 1124; and (2) the Nonmembers' constitutional right to "'prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative.'" *Id.* at 18a; 628 F.3d at 1124 (citations omitted).

Judge Wallace rejected the majority's conclusion that *Hudson* provided a "balancing and reasonable accommodation test" to adjudicate union compliance with its First-Amendment dues process requirements. *Id.* at 9a; *id.* at 22a. Judge Wallace recognized that:

> there is a wide gap between taking "any and all steps demanded by fee payers"—that is, a least-restrictive means test—and what the majority endorses. While *Hudson* does not require a union to adopt procedures that impose the least intrusive burden on fee payers possible, the majority affords the union undue leniency. The majority ignores *Hudson*'s instruction that, because employees' First Amendment interests are implicated by the collection of an agency fee, "the pro-

> cedure [must] be *carefully tailored* to minimize the infringement."

Id. at 25a; 628 F.3d at 1127-28 (original emphasis; citation omitted), quoting *Hudson*, 475 U.S. at 302-03.

For that reason, he concluded "that the majority's 'reasonable accommodation test' is misguided and is inconsistent with case law that we are required to follow." App. A at 26a; 628 F.3d at 1127-28.

The panel majority also held that "not all political expenses are automatically non-chargeable. Rather, if germane to collective bargaining, they can be chargeable just like any other expense." *Id.* at 6a-7a n.2; 628 F.3d at 1119 n.2. Applying this holding, which conflicts with *Lehnert*'s holding concerning political activities, the panel majority concluded that Local 1000's expenditures to oppose Proposition 76 were chargeable to the Nonmembers because it "would have effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances." *Id.* at 6a-7a n.2; 628 F.2d at 1119 n.2.

Judge Wallace dissented from this conclusion, as well. Recognizing that "there are some limited circumstances where a union's political activities can be deemed chargeable," *id.* at 43a n.4; 628 F.3d at 1136 n.4, Judge Wallace hewed to the line this Court drew in *Lehnert*:

> lobbying or other political activities are chargeable when they directly relate to "ratification of negotiated agreements by the proper . . . legislative body" or "to acquiring appropriations for approved collective-bargaining agreements." Where, however . . . the "challenged . . . activities relate . . . to financial support of . . . public employees

> generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees."

Id. at 43a-44a n.4; 628 F.3d at 1135 n.4 (quoting *Lehnert*, 500 U.S. at 520).

The purpose of Proposition 76 "was to limit the annual amount of total state spending." To that end, it "would have given the Governor limited 'authority to reduce appropriations' for future state contracts, collective bargaining agreements, and entitlement programs." *Id.* at 43a; 628 F.3d at 1135 n.4. Consequently, Judge Wallace concluded that "any connection between the Union's challenge [to Proposition 76] was too attenuated to its collective bargaining agreement to be considered a chargeable expense." *Id.*; 628 F.3d at 1135 n.4.

REASONS FOR GRANTING THE WRIT

Since its decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court has regularly granted review to consider various questions related to the enforcement of forced-unionism provisions pursuant to monopoly bargaining statutes in both the private or the public sectors. *See Ellis v. Ry. Clerks*, 466 U.S. 435 (1984); *Teachers Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007); *Locke v. Karass*, 555 U.S. 207 (2009).

Review is appropriate in this case because the Ninth Circuit has demonstrated an utter lack of fidelity to this Court's mandate in *Hudson* "to protect adequately the First Amendment rights of nonmembers from whom it collected an agency fee," App. A at 32a; 628 F.3d at 1131 (Wallace, J., dissenting), and to this Court's pronouncements regarding the limits applicable to chargeable union political and ideological expenditures in its 1991 *Lehnert* decision. Review is also appropriate because the Ninth Circuit's decision has created serious splits among the circuits and other lower courts on both Questions Presented.

I. THE FIRST QUESTION PRESENTED

A. The Panel's Decision Conflicts with This Court's Decisions as to the Standard of Review for Compelled Speech and with *Hudson* Itself.

The decision below directly conflicts with this Court's holdings in *Hudson* that a "'Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining,'" 475 U.S. at 305 (quoting *Abood*, 431 U.S. at 244 (Stevens, J., concurring)); and that "potential objectors [must] be given sufficient information to gauge the propriety of the union's fee." 475 U.S. at 306.

This Court granted certiorari in *Hudson* "'to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.'" 475 U.S. at 302 (quoting *Abood*, 431 U.S. at 237). The Court held that:

> Procedural safeguards are necessary to achieve this objective for two reasons. First, although the

> government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that *the procedure be carefully tailored to minimize the infringement*. Second, *the nonunion employee*—the individual whose First Amendment rights are being affected—*must have a fair opportunity to identify the impact of the governmental action on his interests* and to assert a meritorious First Amendment claim.

475 U.S. at 302-03 (footnotes omitted, emphasis added).

The panel majority engaged in a "balancing and reasonable accommodation" of the union's interest in collecting fees against the Nonmembers' interests in not being forced to subsidize the union's political activities. *See* App. A at 8a-9a; 628 F.3d at 1119-20. That type of balancing test was rejected by this Court a short time ago in *Davenport v. Washington Education Ass'n*, 551 U.S. 177 (2007). There the issue was the validity of a state statute establishing a procedural protection for nonmembers forced to pay union fees as a condition of employment, *i.e.*, a requirement that unions get nonmembers' affirmative consent before using their forced fees for political purposes.

This Court reversed the Washington Supreme Court's decision that the statutory affirmative-consent requirement violated the First Amendment, because the state court had mistakenly "believed that our agency-fee cases . . . balanced the constitutional rights of unions and of nonmembers." *Id.* at 184-85. The Court flatly and unanimously rejected that type of balancing, because "[t]hose cases were not balancing constitutional rights in the manner respondent suggests, for the simple reason that unions have no constitutional entitlement to the fees of nonmember-employees." *Id.*; *see also* App. A at 23a; 628 F.3d at 1126 ("The Union's collection of fees from nonmembers is authorized by an act of legislative grace, not by any inherent 'right' of the Union to the possession of nonmembers' funds") (Wallace, J., dissenting).

Davenport demonstrates that the appropriate analysis for forced-dues cases is the same as in any other government-mandated speech case. In such cases this Court has long applied the most rigorous analysis—"strict scrutiny"—in adjudicating infringements on First-Amendment freedoms.

When forced dues are used for politics or ideological purposes, that is forced political speech. *See Abood*, 431 U.S. at 431-35. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795, 798 (1988). Content-based regulation of speech triggers the highest level of judicial evaluation, "strict scrutiny." *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 827-29 (1995) (content-based discrimination is presumptively unconstitutional). "Under strict scrutiny, the Government must prove that applying [the act] to [the speech in question] furthers a compelling interest and is *narrowly tailored* to achieve that interest." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (Roberts, C.J.) (emphasis altered).

Narrow tailoring in applying *Hudson*'s First-Amendment due process mandates—not a balancing of union versus employee interests—is precisely what *Hudson* requires: "that [nonmembers'] rights are protected by the First Amendment requires that the procedure be *carefully tailored* to minimize the infringement." *Hudson*, 475 U.S. at 303 (emphasis added). Any doubt that the Court intended strict scrutiny is dispelled by the footnote to that statement in which the *Hudson* court cited several cases holding that strict scrutiny is required in the First-Amendment context. *Id.* at 303 n.11.

Nevertheless, the panel majority below held that a union's duty under *Hudson* to provide "sufficient information to gauge the propriety of the union's fee," *id.* at 306, did not require Local 1000 to provide a *Hudson* notice when it imposed its special assessment. App. A at 14a-16a; 628 F.3d at 1122-23. In so doing, the panel majority explicitly rejected application of strict scrutiny and ignored *Hudson*'s narrow tailoring requirement. *Id.* at 8a-9a; 628 F.3d at 1119-20.

The panel majority glossed over Local 1000's own, pre-adoption representations about the purely political purposes for which it was imposing the special assessment. *See id.* at 5a-6a; 628 F.3d at 1118-19. It then concluded no *Hudson* notice about the assessment was necessary, because this Court "recognized the impossibility of determining the chargeability of a union's anticipated expenditures at the outset of the fee year, and specifically approved calculating the present year's objector fee based on the prior year's total expenditures." *Id.* at 10a; 628 F.3d at 1120.

The panel majority erroneously assumed that this Court's discussion of a union's treatment of its *normal* annual dues for purposes of calculating an agency fee was *equally* applicable to a temporary assessment to create a special segregated fund specified as entirely or primarily for political purposes. But when a union imposes a special, additional assessment that is, by its own terms, dedicated to nonchargeable purposes, surely a notice about that assessment—giving nonmembers an opportunity to object—is required to satisfy the union's obligation to provide "sufficient information to gauge the propriety of the union's fee." *Hudson*, 475 U.S. at 306.

The need for such a notice is most acute with regard to those nonmembers who chose not to object based on the regular *Hudson* notice,[5] but might have objected and paid a reduced fee had they known that the union was increasing the fee to engage in political activities. Only an additional notice about the assessment could give them a "a fair opportunity to identify the impact of the governmental action on [their] interests and to assert a meritorious First Amendment claim," as well as prevent the union from "'*obtain[ing] an involuntary loan for purposes to* which the employee objects.'" *Id.* at 303, 305 (quoting *Ellis*, 466 U.S. at 444).

In these circumstances, it is hardly narrow tailoring to hold that the earlier, regular *Hudson notice*, which contained no information about the assessment, was adequate to enable the Nonmembers to decide whether to object to paying the full agency fee that they would pay during the coming fee year. As Judge Wallace explained, "because the Union refused to give nonmember employees an opportunity to object when information about the temporary assessment was disclosed, these nonmembers were essentially left in the 'dark' about the nature of the agency fee during the time period in which they were required to file objections." App. A at 36a; 628 F.3d at 1132 (quoting *Hudson*, 475 U.S. at 306).

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[5] This is the subclass of "nonobjectors" that was certified by the district court. R. 81 at 9; *Knox*, 2006 WL 3147683, at *4.

In sum, the Court of Appeals' decision conflicts with this Court's many cases requiring strict scrutiny in the First-Amendment context and with *Hudson*'s mandate that union forced-fee procedures be "carefully tailored" and give nonmembers "a fair opportunity to identify the impact" of the fee demanded on their interests. 475 U.S. at 303.

B. There Is a Serious Split Among the Circuits.

There is a serious split among the circuits on the question of the appropriate standard to be applied when adjudicating a union's compliance with *Hudson*. Although no circuit has expressly applied strict scrutiny, every other circuit squarely to address this issue—the Second, Fourth, Fifth, and Sixth Circuits—has explicitly held that under the First Amendment, forced-fee procedures must be "'narrowly drawn' to comply with the strictures imposed by *Hudson*." *Seidemann v. Bowen*, 499 F.3d 119, 124 (2d Cir. 2007) (quoting *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335, 339-40 (2d Cir. 1987)).[6]

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[6] Other cases to the same effect include, *e.g., Dashiell v. Montgomery Cty.*, 925 F.2d 750, 754 (4th Cir. 1991) ("Because First Amendment freedoms are compromised by a state-authorized union or agency shop, any impingement must be drawn as narrowly as is consistent with the state's interest in permitting an exclusive representative to represent all employees for collective bargaining purposes."); *Shea v. Int'l Ass'n of Machinists & Aerospace Workers*, 154 F.3d 508, 515-17 (5th Cir. 1998) ("'the procedure [must] be *carefully* tailored to *minimize* the infringement'") (quoting *Hudson*, 475 U.S. at 303) (original emphasis); *Tierney v. City of Toledo*, 824 F.2d 1497, 1502 (6th Cir. 1987); *Damiano v. Matish*, 830 F.2d 1363, 1369 (6th Cir. 1987).

The split among the circuits is most clearly highlighted in *Andrews*. There, the Second Circuit held that the district court erred in determining the adequacy of the union's fee procedures "with a balancing test in which the cost to the union and the practicality of the procedures were to be weighed against the dissenters' First Amendment interests." 829 F.2d at 339.

Only the Ninth Circuit applies a "balancing and reasonable accommodation test," App. A at 9a; 628 F.3d at 1120. This test was first applied in *Grunwald v. San Bernardino City Unified School District*, 994 F.2d 1370, 1376 n.7 (9th Cir. 1993). As here, however, the panel in *Grunwald* was sharply divided over the test for determining the adequacy of the union's fee collection procedure. Judge Brunetti not only dissented, but expressly found that the union's procedure in that case was inadequate because "it is not 'carefully tailored to minimize the infringement' on nonmembers' First Amendment rights." *Id.* at 1378, quoting *Hudson*, 475 U.S. at 303.[7]

Because the standard the Ninth Circuit applies conflicts with this Court's decisions in *Hudson* and other First-Amendment cases, and is contrary to the standard applied by other circuits that have addressed the issue, this Court should grant review to settle the split in the circuits.

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[7] Although Judge Wallace did not adopt a "least-restrictive means" test here, he criticized the majority's balancing and "'reasonable accommodation test'" as "unfaithful to *Hudson*," and "misguided." App. A at 23a-26a; 628 F.3d at 1126-28 (Wallace, J., dissenting).

II. THE SECOND QUESTION PRESENTED

Declaring that "not all political expenses are automatically non-chargeable," the panel majority determined that the Nonmembers could constitutionally be required to subsidize Local 1000's expenditures for a ballot proposition which, it said, "would have effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances." App. A at 6a-7a n.2; 628 F.3d at 1119 n.2. This holding is contrary to this Court's limitations on the use of forced union fees, and with the conclusion reached by other circuits as to lobbying and electoral activities.

A. The Panel's Decision Conflicts with Both Tests for Chargeability Enunciated in *Lehnert*.

From its earliest cases, this Court has recognized that a union's "authority to impose dues and fees was restricted at least to the 'extent of denying the unions the right, over the employee's objection, to use his money to support political causes which he opposes.'" *Ellis*, 466 U.S. at 447 (quoting *Machinists v. Street*, 367 U.S. 740, 768 (1961)). Seven years later, in *Lehnert*, "[b]ecause of the importance of the issues," this Court granted certiorari to decide whether objecting nonmembers could constitutionally be compelled to subsidize six types of union activities, including lobbying and electoral politics. 500 U.S. at 514.

In *Lehnert*, the Court held that "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; *and* (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* at 519 (emphasis added). Applying this test, Justice Blackmun, joined by Chief Justice Rehnquist and Justices White and Stevens, ruled that nonmembers "may not be charged over their objection for lobbying activities that do not concern legislative ratification of, or fiscal appropriations for, their collective-bargaining agreement." *Id.*

One of the specific expenses at issue in *Lehnert* was the costs of a "program designed to secure funds for public education in Michigan," which the petitioner nonmembers argued "went beyond lobbying activity and sought to affect the outcome of ballot issues and 'millages' or local taxes for the support of public schools." *Id.* at 527. Justice Blackmun found it "of little consequence" whether the program just involved lobbying or also involved electoral politics. His opinion held that, because "[n]one of these activities was shown to be oriented toward the ratification or implementation of petitioners' collective-bargaining agreement . . . . none may be supported through the funds of objecting employees." *Id.*

Justice Scalia, joined by Justices O'Connor, Souter, and Kennedy, adopted a slightly different general test for the chargeability of union expenses: "to be constitutional a charge must at *least* be incurred in the performance of the union's statutory duties" as a bargaining agent. *Id.* at 558 (Scalia, J., dissenting in part; original emphasis). In applying this test, Justice Scalia's opinion "agree[d] that the challenged lobbying expenses are nonchargeable," because, "though they may certainly affect the outcome of negotiations, [they] are no part of [the] collective bargaining process." *Id.* at 559 (concurring in relevant part).

Justice Blackmun noted that there is a "'somewhat hazier' line between bargaining-related and purely ideological activities in the public sector." *Id.* at 520 (quoting *Abood*, 431 U.S. at 236). However, his opinion was clear that:

> Where . . . the challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective-bargaining agreement, but to financial support of the employee's profession or of public employees generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees.

500 U.S. at 520.

The Ninth Circuit's decision here is directly contrary to this Court's holding in *Lehnert* that the lobbying and electoral politics at issue there are constitutionally nonchargeable. Proposition 76 did not ratify or implement any collective bargaining agreement, much less those for the Nonmembers' bargaining units.

Even as mis-described by the panel majority, Proposition 76 merely "would have effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances, undermining the Union's ability to perform its representation duty of negotiating effective collective bargaining agreements." App. A at 6a-7a n.2; 628 F.3d at 1119 n.2. Like the lobbying and ballot-proposition activity "to secure funds for public education" held nonchargeable in *Lehnert*, 500 U.S. at 527 (opinion of Blackmun, J.), though the union's opposition to Proposition 76 might have "affect[ed] the outcome of [future] negotiations," *id.* at 559 (opinion of Scalia, J.), "any connection between the Union's challenge was too attenuated to its collective bargaining agreement to be considered a chargeable expense," as Judge Wallace concluded. App. A at 43a n.4; 628 F.3d at 1135 n.4.

B. There Is a Serious Split, and Confusion, Among the Circuits.

There is a serious split, and confusion, among the circuits on the chargeability of union political and lobbying activities. The District of Columbia Circuit has held that *Lehnert*'s narrow exception for "*ratification or implementation of a dissenter's* collective-bargaining agreement," 500 U.S. 520, cannot be extended beyond its precise terms.

However, the Second and Ninth Circuits have concluded that *Lehnert's narrow and specific limitation* upon the chargeability of union political, lobbying, and ideological activities is open to expansion. Moreover, the Sixth Circuit has confused the issue in a muddled opinion.

In *Miller v. Air Line Pilots Ass'n*, the union argued that the *Lehnert* exception for lobbying for contract ratification and implementation permitted it to charge objecting nonmembers for "its contacts with government agencies and Congress concerning the union's views as to appropriated federal regulation of airline safety," because those "government relations activities are interconnected with those airline safety issues that animate much of its collective bargaining." 108 F.3d 1415, 1422 (D.C. Cir. 1997), *aff'd on other grounds*, 523 U.S. 866 (1998).[8]

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[8] First-Amendment cases such as *Lehnert* are controlling under the Railway Labor Act, because this Court held in *Railway Employes' Department v. Hanson*, that "agency shop agreements under the RLA carried the imprimatur of federal law." 108 F.3d at 1419, citing *Hanson*, 351 U.S. 225, 232, 238 (1956).

The District of Columbia Circuit, unlike the Ninth Circuit here, rejected extension of *Lehnert*'s "limited exception" even though, as was the case with Proposition 76, "government action . . . may foreclose" collective bargaining. *Id.* at 1423. The court explained that such an "extension of the *Lehnert* exception would swallow the *Lehnert* rule," *id.*, for, "if the union's argument were played out, virtually all of its political activities could be connected to collective bargaining." *Id.* at 1422.

In direct contrast, in *Seidemann v. Bowen*, the Second Circuit expanded *Lehnert*'s limited exception. It declined to read *Lehnert* as holding that "a public-sector union may charge dissenters for political activity only in the context of legislative ratification or implementation of a collective bargaining agreement." 584 F.3d 104, 111-12 (2d Cir. 2009). That court, like the Ninth Circuit here, concluded that "the relevant inquiry is whether a union's political activities were . . . 'germane' to collective bargaining." *Id.* at 112.[9]

The Sixth Circuit's view as to the chargeability of lobbying is unclear. In *Reese v. City of Columbus*, the Sixth Circuit concluded that it must apply the position of Justice Blackmun and the three other Justices who joined his opinion. Moreover, the court recognized that those four Justices "'held' that a state could constitutionally charge dissenters for lobbying expenses only in 'the limited context of contract ratification or implementation,'" and that "the first two prongs of the [*Lehnert* Court's three-part] test were met only if the lobbying related to the dissenters' collective bargaining agreement." 71 F. 3d 619, 625 (6th Cir. 1995) (emphasis added) (quoting *Lehnert*, 500 U.S. at 522).

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[9] Under that standard, of course, the "program designed to secure funds for public education in Michigan" held constitutionally nonchargeable by eight Justices in *Lehnert* could be charged to objecting nonmembers. *See* 500 U.S. at 527 (opinion of Blackmun, J.); *accord id.* at 559 (opinion of Scalia, J., concurring in relevant part).

That would suggest that the Sixth Circuit disagrees with the Ninth and Second Circuit's expansive reading of the *Lehnert* lobbying exception. On the other hand, however, the *Reese* court remanded for a determination whether the lobbying expense involved, which was "for the negotiation, ratification, or implementation of a collective bargaining agreement," *id.*, "*benefitted* the objector's *unit*." *Id.* at 626 (emphasis added). Whether the lobbying in question "benefitted the objector's unit" is a far more expansive standard than that stated by Justice Blackmun: whether it was "*related to* the dissenters' collective bargaining *agreement*." *Id.* at 625 (emphasis added). In short, the Sixth Circuit's decision is internally inconsistent.

C. The Panel's Decision Conflicts with State Supreme Court Decisions.

The Ninth Circuit's decision in this case conflicts directly with the decisions of the highest courts of not fewer than three states.

There is a direct conflict between the decision of the Ninth Circuit in this case and the Indiana Supreme Court in *Albro v. Indianapolis Education Ass'n*, 585 N.E.2d 666 (IND. CT. APP.), *adopted sub nom. Fort Wayne Education Ass'n v. Aldrich*, 594 N. E. 2d 781 (IND. 1992). In *Albro*, the Indiana Court of Appeals applied *Lehnert* to hold that "any lobbying expenses unrelated to the bargaining unit's collective bargaining agreement are not chargeable expenses."

585 N.E.2d at 672. The court specifically adopted as "persuasive" the *Lehnert* plurality's conclusion "that lobbying expenses unrelated to the unit's collective bargaining agreement do not survive the Court's three-prong chargeability standard." *Id.* Determining that the Court of Appeals was "correct in the *Albro* case," the Indiana Supreme Court affirmed and adopted "by reference that opinion in its entirety." *Aldrich*, 594 N.E.2d at 781.

Similarly, the Ninth Circuit's decision conflicts directly with that of the Wisconsin Supreme Court in *Browne v. Wisconsin Employment Relations Commission*, 169 Wis. 2d 79, 485 N.W.2d 376 (WIS. 1992). The Commission had "held that lobbying 'for collective bargaining legislation or regulations or to effect changes therein' or 'for legislation or regulations affecting wages, hours and working conditions of employes generally,'" was properly chargeable to nonmembers. *Id.* at 107; 485 N.W.2d at 387. Reversing in pertinent part, the Wisconsin Supreme Court reasoned that Justices Blackmun's and Scalia's opinions, taken together, limit chargeable union lobbying activities to only those "related to contract ratification or implementation. *Id.*; 485 N.W. 2d at 387.

Likewise, the Ninth Circuit's decision conflicts directly with that of the Supreme Judicial Court of Massachusetts in *Belheumer v. Massachusetts Labor Relations Commission*. That court reasoned that "the limited context in which political activities are chargeable" is when they are for "'the ratification or implementation of [the petitioners'] collective-bargaining agreement.'" 432 Mass. 458, 471, 735 N.E.2d 860, 871 (MASS. 2000) (quoting *Lehnert*, 500 U.S. at 520 (opinion of Blackmun, J.)). The court held that, therefore, as in *Lehnert*, a teacher union's "advocating for funding of public education in general," which obviously could benefit the nonmembers' bargaining unit, "is the type of political speech for which the union may not charge." *Id.*; 735 N.E.2d at 871.

CONCLUSION

The Ninth Circuit's decision clearly conflicts with this Court's compelled-speech jurisprudence generally, and with its decision in *Hudson* as to the standard to be applied when considering the obligation to provide notice and disclosure when extracting compelled fees. Moreover, the loose standard the Ninth Circuit uses conflicts with the stricter standard applied by other circuits.

Consequently, the circuit in which an individual is employed now determines whether a nonmember subject to a forced-unionism clause is entitled to notice when a labor union significantly increases the amount of fees extracted in order to engage in political and ideological activities. Moreover, where the question has not yet been determined by a circuit, uncertainty and confusion are likely to continue, as unions in those circuits have now been provided with a virtual roadmap for *Hudson* evasion, of how to "[l]eav[e] the nonunion employees in the dark about the source of the figure for the agency fee," and how to insure that "nonunion employees' contributions might be used for impermissible purposes." *Hudson*, 475 U.S. at 306, 309.

Similarly, the Ninth Circuit's decision clearly conflicts with this Court's decision in *Lehnert*, where an eight-Justice majority plainly limited chargeable union political and lobbying activities to those for ratification or implementation of an objecting nonmembers' collective bargaining agreement. Yet the circuits and state highest courts are in conflict and confusion about what this Court actually held concerning compelled financial support of "the discussion of governmental affairs, which is at the core of our First Amendment freedoms." *Lehnert*, 500 U.S. at 522.

Therefore, this Court should exercise its supervisory power to resolve the conflicts and confusion that now exist, and to insure that the lower courts protect adequately the First-Amendment rights of nonmembers forced to pay union fees to keep their jobs.

For the reasons stated above, certiorari should be granted, and the case set for plenary briefing and argument on both important questions presented.

Respectfully submitted,

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March 2011

APPENDIX

APPENDIX A

[628 F.3d 1115]

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 08 16645.

Dianne Knox; William L. Blaylock;
Robert A. Conover; Edward L. Dobrowolski, Jr.;
Karyn Gil; Thomas Jacob Hass; Patrick Johnson;
Jon Jumper, On Behalf of Themselves and
the Class They Seek to Represent,
Plaintiffs Appellees,
v.
California State Employees Association, Local
1000, Service Employees International Union,
AFL-CIO-CLC,
Defendant Appellant,
and
Steve Westly, Controller, State of California,
Defendant.

Argued and Submitted Oct. 9, 2009.
Filed Dec. 10, 2010.

Appeal from the United States District Court
for the Eastern District of California,
Morrison C. England, District Judge, Presiding. D.C.
No. 2:05 CV 02198 MCE KJM.

[1117] Before: J. CLIFFORD WALLACE,
DAVID R. THOMPSON and SIDNEY R. THOMAS,
Circuit Judges.

Opinion by Judge THOMAS;
Dissent by Judge WALLACE.

OPINION

THOMAS, Circuit Judge:

This appeal presents the question of whether a union is required, pursuant to *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), in addition to an annual fee notice to nonmembers, to send a second notice when adopting a temporary, mid-term fee increase. Under the circumstances presented by this case, we conclude that a second notice is not required, and we reverse the judgment of the district court.

I.

A.

Congress has long recognized the "important contribution of the union shop to the system of labor relations." *Locke v. Karass*, 555 U.S. 207, 129 S.Ct. 798, 803, 172 L.Ed.2d 552 (2009) (*quoting Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 222, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977)). The Supreme Court has underscored this Congressional policy by enforcing the right of a union, as the exclusive collective bargaining representative of its employees, to require nonunion employees to pay a fair share of the union's costs. *Ellis v. Bhd. of Ry., Airline and S.S. Clerks, Freight Handlers, Express and Station Employees*, 466 U.S. 435, 448, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984). However, the Supreme Court has also recognized the First Amendment limitation on collection of fees from dissenting employees for the support of ideological causes not germane to the union's duties as collective bargaining agent. *Id.* at 447, 104 S.Ct. 1883.

In *Hudson*, the Supreme Court established certain procedural safeguards to balance these interests by requiring "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision-maker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310, 106 S.Ct. 1066. Notices issued pursuant to this language have become known as "*Hudson* notice[s]." *Wagner v. Prof'l Eng'rs in Cal. Gov't*, 354 F.3d 1036, 1039 (9th Cir. 2004).

After receiving a *Hudson* notice, "the nonunion employee has the burden of raising an objection, but . . . the union retains the burden of proof" as to the appropriate proportion of fair share fees. *Hudson*, 475 U.S. at 306, 106 S.Ct. 1066. It is the policies underlying *Hudson* that inform the determination of whether a *Hudson* notice is adequate: "Basic considerations of fairness, as well as concern for the First Amendment rights at stake, . . . dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee." *Id.*

B

This appeal involves the adequacy of a *Hudson* notice given by SEIU Local 1000 (the "Union"), the exclusive bargaining agent for California state employees. The Union and the State of California have entered into a series of Memoranda of Understanding controlling the terms and conditions of employment for employees, including a provision requiring that all State employees in these bargaining units join the Union as formal Union members, or if opting not to join, pay an "agency" or "fair share" fee to the Union for its representational efforts on their behalf. *Id.* (known as an "agency shop agreement"). The agency fee is calculated as a percentage of the Union dues paid by members of the Union.

[1118] The Union issues a *Hudson* notice to all nonmembers every June. The constitutionally required notice is meant to provide nonmembers with an adequate explanation of the basis of the agency fee. *Hudson*, 475 U.S. at 310, 106 S.Ct. 1066. The notice contains information regarding the Union's expenditures from the most recently audited prior year, broken down by major category of expense and then, within each category, allocated between "chargeable" and "non chargeable" classifications. "Chargeable" expenses are those that are "germane" to the union's representational functions, and can be charged to all nonmembers of the union. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991 (Blackmun, J., plurality opinion). "Non chargeable" expenses are those unrelated to the union's representational functions, such as partisan political expenditures or purely ideological issues. *Id.* The union may charge nonmembers for non chargeable expenses, but the nonmember has the option to object, and only be charged a reduced agency fee based upon the percent of the union's total expenditures that can be classified as "chargeable." In addition, the nonmember is not charged for certain union sponsored benefits, such as a credit union credit card, that are not available to nonmembers.

The financial information in the notice forms the basis for calculating the fee to be paid by nonmembers during the ensuing fee year. The notice also provides that for thirty days after the notice is issued, nonunion employees can object to the collection of the full agency fee, and elect instead to only pay a reduced rate during the upcoming fee year based on the percentage ratio of chargeable expenditures to total expenditures. During that thirty day period, nonmembers can challenge the Union's calculation of its chargeable and non-chargeable expenses, to be resolved by an impartial decision maker. *Knox v. Westly*, No. 2:05 CV 02198, 2008 WL 850128, at *2 (E.D.Cal. Mar. 28, 2008).

A given agency fee is in effect from July 1 through June 30 of the following year (the "fee year"), at which point the agency fee set forth in the Union's next *Hudson* notice goes into effect. The 2005 *Hudson* notice set the agency fee to be paid by nonunion employees as 99.1% of the Union dues.[1] The reduced agency fee of 56.35% of Union dues would be charged to nonmembers who objected to paying the full agency fee, and who requested a reduction pursuant to the procedures and deadlines outlined in the notice. The notice explicitly stated dues and fees were subject to change without further notice to fee payers.

During the summer of 2005, the legislative bodies within the Union debated and approved a temporary assessment (also referred to as a dues and fees increase) equal to .0025, or .25% of Union members' gross wages. The increase took effect at the end of September 2005 and terminated at the end of December 2006, and was expected to raise $12 million for the Union.

Specifically, on July 30, 2005 the Union's Budget Committee proposed an emergency temporary assessment to create what was termed in the agenda item introducing it as a "Political Fight Back Fund." This agenda item stated the Fund "will be used for a broad range of political expenses" in response to several "anti union" propositions on the November 2005 special election ballot in California, and that the fund "will not be used for regular costs of the union-such as office rent, staff salaries or [1119] routine equipment replacement." *Id.* On August 27, 2005 Union delegates voted to implement the temporary dues increase. On August 31, 2005, the Union sent a letter to all members and agency fee payers stating that they were subject to the new increase, and that the fund would be used "to defeat Propositions 76 and 75," other future attacks on the Union pension plan, and other activities.

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[1] As noted, the gap between 99.1% and 100% represents the value of member restricted benefits.

The Union material indicated that the fund would be used for political activities. Yet, in response to inquiries, the Union specifically stated it intended to split the increase "between political actions and collective bargaining actions." Further, not all of the political activities fell into the "non-chargeable" category. The assessment itself included no spending limitations, and the money was actually used for a range of activities, both political and not, and both chargeable and not.[2] Pursuant to the increase, the

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[2] The district court and dissent both conflate political expenses and non chargeable expenses when condemning the assessment as "purely political" and a drastic departure from usual Union spending. Yet, this is not supported by the record. The later audit revealed the assessment included both chargeable and non-chargeable expenses, and the chargeable percentage for the 2006 *Hudson* notice, which included the spending from the assessment, was actually larger than that from the 2005 notice.

> In addition, not all political expenses are automatically non-chargeable. Rather, if germane to collective bargaining, they can be chargeable just like any other expense. *See, e.g., Lehnert*, 500 U.S. at 520, 111 S.Ct. 1950;

Controller began collecting additional fees from Plaintiffs at the end of September 2005.

Plaintiffs represent two classes of nonunion employees, those who objected to the Union's 2005 *Hudson* notice ("objectors") and those who did not ("nonobjectors") (collectively "Plaintiffs"). *Knox*, 2008 WL 850128, at *2. Plaintiffs initiated this action in November 2005, alleging the assessment violated their First, Fifth, and Fourteenth Amendment rights under 42 U.S.C. § 1983. Plaintiffs filed for summary judgment, and the Union filed a cross-motion for partial summary judgment. The district court granted Plaintiffs' motion in its entirety, and partially granted and partially denied the Union's motion. This timely appeal followed.

We review *de novo* a district court's grant of summary judgment on the sufficiency of the *Hudson* notice. *Cummings v. Connell*, 316 F.3d 886, 890 (9th Cir.2003). On review, we must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir.2004).

Foster v. Mahdesian, 268 F.3d 689, 692 n. 6 (9th Cir. 2001); *Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 853, 859 60 (D.C.Cir.2006) (regulation allowing employer to unilaterally abrogate collective bargaining agreements fundamentally diminishes a union's bargaining position and nullifies the right to collective bargaining). Here, Proposition 76 would have effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances, undermining the Union's ability to perform its representation duty of negotiating effective collective bargaining agreements.

II

A.

In reviewing the adequacy of the *Hudson* notice, we employ our usual standard of review, as dictated by *Hudson*. In that case, the Supreme Court articulated the legal standard to be applied in this analysis as a balancing test, stating that "[t]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object [1120] thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities." *Hudson*, 475 U.S. at 302, 106 S.Ct. 1066 (quoting *Abood*, 431 U.S. at 237, 97 S.Ct. 1782).

The Plaintiffs argue we should abandon the balancing test established in *Hudson*, in favor of strict scrutiny review. They argue that this case involves compelling their speech on political issues, and that therefore the government mandated speech cases, and their application of strict scrutiny should apply, citing *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) and *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 827 29, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). We disagree.

First, *Hudson* itself articulated the legal standard to be applied, and we are not free to reject the balancing test mandated by the Supreme Court.

Second, we articulated the test in *Grunwald v. San Bernardino City Unified Sch. Dist.*, 994 F.2d 1370 (9th Cir.1993). We noted in that case that in challenges to the First Amendment procedure used by unions, the union need not employ procedures that "would minimize further the burden on agency fee payers." *Grunwald*, 994 F.2d at 1376 n. 7. "The test, after all, is not whether the union and the [employer] have come up with the system that imposes the least burden on agency fee payers, regardless of cost (a test no system could possibly satisfy); rather we inquire whether the system reasonably accommodates the legitimate interests of the union, the [public employer] and nonmember employees." *Id*.

Therefore, we will apply the normal *Hudson* balancing and reasonable accommodation test we have used in the past when deciding challenges to *Hudson* notice procedures.[3] *See, e.g., Wagner*, 354 F.3d at 1039; *Cummings*, 316 F.3d at 890.

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[3] The dissent takes issue with the characterization of *Hudson* requirements as a balancing test, focusing instead on language requiring unions to minimize impingement on nonmembers' rights and emphasizing the Union has no "right" to agency fees to be balanced by such a test. The dissent insists a balancing test is inappropriate, yet, there is no other way to faithfully characterize the procedure set out in *Hudson*. *Hudson* acknowledges that competing interests are at play, and describes a particular set of constitutionally acceptable procedures for attempting resolve with conflict with fairness to both sides. That is a balancing test.

> In addition, we have consistently recognized that unions have a legitimate interest and "settled" ability to charge agency fees. *See, e.g., Cummings*, 316 F.3d at 889. We do not intimate this rises to the level of a constitutional "right," but that does not mean the union does not have any rights at all in such a situation. *Hudson*, 475 U.S. at 302, 106 S.Ct. 1066 (affirming union's right to "require nonunion employees, as a condition of employment" to pay fair share fees).

B

Applying the balancing test, we conclude that the Union did not violate the *Hudson* requirements. The Supreme Court in *Hudson* recognized the impossibility of determining the chargeability of a union's anticipated expenditures at the outset of the fee year, and specifically approved calculating the present year's objector fee based on the prior year's total expenditures. The Supreme Court explained, "We continue to recognize that there are practical reasons why absolute precision in the calculation of the charge to nonmembers cannot be expected or required. Thus, for instance, the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year." *Hudson*, 475 U.S. at 307 n. 18, 106 S.Ct. 1066 (internal quotation marks and citations omitted). *Hudson* thus struck a balance between the rights and burdens in this context, acknowledging that a union is [1121] not constitutionally required to take any and all steps demanded by fee payers to insure that its annual fee notice accurately predicts its actual spending in the upcoming year.

Use of the prior year method is a practical necessity because, for large public sector unions, the *Hudson* notice must be based on audited financial statements, with the union's chargeable percentage calculation verified by an independent auditor, and the union must send its fee payers the independent auditor's report with its *Hudson* notice. *Hudson*, 475 U.S. at 307 n. 18, 106 S.Ct. 1066. The audit requirement renders impossible any method of determining the chargeability of the upcoming fee year's expenditures other than basing it on the prior year's actual expenditures, because one cannot audit anticipated future expenditures. Until the money has been spent, the auditor cannot determine whether the expenditures which the union claims it made for certain expenses were actually made for those expenses. *Prescott v. County of El Dorado*, 177 F.3d 1102, 1107 (9th Cir.1999), *vac'd & remanded on other grounds*, 528 U.S. 1111, 120 S.Ct. 929, 145 L.Ed.2d 807, *reinstated in relevant part*, 204 F.3d 984 (9th Cir.2000).

The inevitable effect of the *Hudson* "prior year" method is a lag of at least one year between the time when a union incurs expenditures and when the audited ratio of its chargeable expenditures to total expenditures is applied to calculate the objectors' fee for the next year. Fluctuation is inherent in such a method: in each year, objectors may be "underpaying" or "overpaying" fees when compared to the chargeable percentage of the union's actual expenditures in that year because under *Hudson*'s "prior year" method the fee is based upon the chargeable percentage of the prior year's actual expenses, but the inevitable effect of the *Hudson* method is that these over and undercharges even out over time. The *Hudson* notice can never be more than a *prediction*, which will inevitably be incorrect as to the union's actual expenditures. The *Hudson* notice is not, and cannot be expected to be, more than that.

C

The district court faulted the Union for failing to make an accurate prediction in its June 2005 *Hudson* notice of its actual expenditures in the remainder of that fee year due to the subsequent enactment of the temporary increase. Yet, under the normal *Hudson* procedure, any payments over and above the Union's actual chargeable expenditures in the 2005 fee year would be incorporated into the rate for the next fee year. The Supreme Court has determined that this is sufficiently accurate to comply with the constitutional restrictions. There is no principled distinction to be drawn between the paradigmatic *Hudson* procedure and the one employed here.

Indeed, in the usual *Hudson* notice situation, the actual chargeable percentage of a union's actual spending in any given year, as well as the precise dollar amount of dues and fees, will likely vary from the prior year's figures set forth in the applicable *Hudson* notice. The Plaintiffs allege the Union did not provide a procedure that would avoid the risk that nonmembers' funds from the special assessment would be used, even temporarily, to finance non-chargeable activities, but merely offered dissenters the possibility of a rebate. Therefore, the Plaintiffs reason, the procedure is unconstitutional. This construction takes the central *Hudson* concepts completely out of context and applies them in a way that would not only invalidate the fee increase, but would invalidate the very procedural system decreed by the Supreme Court in *Hudson*. Plaintiffs appear to argue that because the assessment was [1122] to be used for "purely" political reasons, it could not be constitutionally collected from nonmembers in the first place, and that any collection and then later incorporation of the non chargeable amount into a future agency fee objector rate would be tantamount to an impermissible rebate of the earlier fee. Yet, the Union had *already* reduced the fee for objecting nonmembers, and has demonstrated that the assessment was not purely non-chargeable, nor intended to be so. Further, the record belies the assertion that the charges were used "purely" for non chargeable expenses.[4]

The section of *Hudson* discussing rebates did not condemn the advance reduction procedure the Union used here, but rather a "pure rebate" system where the union collects a fee that is equal or nearly equal to full dues, and then provides a rebate of the non chargeable portion to objectors only at the end of the fee year. *See Hudson*, 475 U.S. at 305, 106 S.Ct. 1066; *see also Ellis*, 466 U.S. at 443 44, 104 S.Ct. 1883. Here the Union charged objectors only 56.35% of the temporary increase, the chargeable percentage set forth in the June 2005 notice, rather than 100% of the increase followed by a later rebate.

Additionally, the district court's direction that a union must issue a second *Hudson* notice when it intends "to depart drastically from its typical spending regime and to focus on activities that [are] political or ideological in nature," *Knox*, 2008 WL 850128 at *8, is practically unworkable. Union spending may vary substantially from year to year-in one year there may be a new collective bargaining agreement negotiated, resulting in a high chargeable percentage for objectors that is followed by an election year that results in a low chargeable percentage for objectors. In fact, for example, the chargeable percentage for 2006, the year incorporating the fee increase spending, was *higher* than that for the 2005 Hudson notice.

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[4] The district court and dissent argue the 2005 *Hudson* notice is inadequate partly because the prior year method does not speak to the "political" nature of the assessment or the propriety of the Union's chargeability determinations. Yet, we have held there is a fundamental difference between "chargeability" challenges and "procedural" *Hudson* notice challenges. *Wagner*, 354 F.3d at 1046 47. Plaintiffs explicitly concede theirs is only a procedural notice challenge, not a challenge to the Union's actual spending of the fees. Since, according to Plaintiffs, chargeability is immaterial to their challenge, their chief argument (and that of the dissent) premised upon the alleged non chargeability of the increase (its *purely* political nature), must fail.

Hudson's prior year method assumes and accepts that a union has no "typical spending regime," and that even though spending might vary dramatically, a single annual notice based upon the prior year's audited finances is constitutionally sufficient. Otherwise, a union's *Hudson* notice for an upcoming partisan political election year, following a negotiating year, could not be based upon the union's actual total expenditures in the previous year because the union would intend in the coming fee year to "depart drastically from its previous spending regime and to focus on activities that are political or ideological in nature." Yet, this is the system set out by *Hudson*, and no following case has questioned its continuing vitality. The fact that a projection of expenditures may differ from actual expenditures should surprise no one. The key analytic point for *Hudson* purposes is that proper notice is given and subsequent adjustments made.

The district court's conclusion was also at odds with our precedent. The district court required the Union to come up with a system that imposes the least burden on agency fee payers. However, the legal requirement for unions in this situation is [1123] to establish a system that merely "reasonably accommodates the legitimate interests of the union, the [public employer] and nonmember employees," as is the Union's obligation under *Grunwald*, 994 F.2d at 1376 n. 7; *accord Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir.1987) ("When the union's plan satisfies the standards established by Hudson, the plan should be upheld even if its opponents can put forth some plausible alternative less restrictive of their right not to be coerced to contribute funds to support political activities that they do not wish to support."). The 2005 notice satisfied the standards established by *Hudson*.

The Supreme Court's decision in *Davenport v. Washington Education Ass'n*, 551 U.S. 177, 127 S.Ct. 2372, 168 L.Ed.2d 71 (2007), does not lead us to a contrary conclusion. In *Davenport*, the Supreme Court held the *Hudson* requirements outline a minimum set of procedures by which a public sector union in an agency shop relationship could meet its constitutional requirements, and that state *legislatures* may place limitations on a union's entitlement to fees above those laid out in *Hudson*. *Davenport* arose in the context of the state of Washington enacting legislation requiring unions to give all nonmembers the objector fee rate unless they affirmatively agreed to be charged for non chargeable activities (in contrast to the California rule where silence equals consent, rather than dissent). *Id.* at 182-83, 127 S.Ct. 2372. *Davenport* held that while the "silence equals consent rule" is constitutional, it is *also* constitutional for a state to make a "silence equals dissent" rule. *Id.* at 190-91, 127 S.Ct. 2372. Under *Davenport*, it is state legislatures, rather than courts, that have the power to implement higher standards. This holding does not alter our conclusion in this case that the 2005 notice was adequate to cover the subsequent dues increase, as *Davenport* does not speak to such a situation.

III

The Union's notice in this case complied with the *Hudson* procedural requirements. Therefore, we reverse the district court, and remand with instructions to deny the Plaintiffs' motion for summary judgment. We also reverse the denial of defendant's motion for partial summary judgment regarding the consent of nonobjectors under California law, and remand with instructions to grant the motion. We reverse the award of nominal damages to Plaintiffs.

REVERSED AND REMANDED.

WALLACE, Circuit Judge, dissenting:

I dissent from the majority's opinion because it is not faithful to the principles guiding the Court's decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). The majority begins from an inaccurate account of the interests at stake, and applies the procedures set forth in *Hudson* without due attention to the distinguishing facts of this case. The result is contrary to well-established First Amendment principles.

I.

I begin with the legal authorization for the agency shop system because it provides the framework for my evaluation of the issues in this case, and because I am of the view that the majority's opinion presents an incomplete account of the relevant legal principles.

A.

The National Labor Relations Act allows the states to regulate their labor relationships with public sector employees. *See* 29 U.S.C. § 152(2). Many states, including California, allow public sector unions and government employers to enter into "agency-shop" arrangements. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 511, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991); [1124] Cal. Gov't Code § 3502.5(a). Defendant SEIU Local 1000 (Union) is the designated bargaining representative for California state employees, pursuant to such an agency shop arrangement. The Union is legally obligated to represent equally all employees in the bargaining unit. *Lucas v. NLRB*, 333 F.3d 927, 931 32 (9th Cir.2003). The Union levies a fee on every employee whom it represents in collective bargaining, even if the employee refuses to join the Union. *See, e.g., Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 760 764, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961). The fees paid by bargaining unit employees who are not members of the Union are commonly known as "agency fees" or "fair share fees." Plaintiffs in this case are eight nonmembers of the Union, representing a class of approximately 28,000 public employees, who are required to pay an agency fee.

Agency-shop arrangements present First Amendment concerns. *See id.* at 749, 81 S.Ct. 1784 (union shop presents First Amendment "questions of the utmost gravity"); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 236 38, 76 S.Ct. 714, 100 L.Ed. 1112 (1956). These concerns are particularly sharp in the public sector: "agency shop arrangements in the public sector raise First Amendment concerns because they force individuals to contribute money to unions as a condition of government employment." *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181, 127 S.Ct. 2372, 168 L.Ed.2d 71 (2007). The Court explained in *Davenport* that "[r]egardless of one's views as to the desirability of agency-shop agreements, . . . it is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees." *Id.* at 184, 127 S.Ct. 2372, citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 255, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977).

Despite the infringement of First Amendment rights engendered by the agency shop arrangement, the Supreme Court has deemed such arrangements to be constitutionally permissible in principle. *See Locke v. Karass*, 555 U.S. 207, 129 S.Ct. 798, 801, 172 L.Ed.2d 552 (2009) (holding that "in principle, the government may require this kind of payment [i.e. agency fees] without violating the First Amendment"). The Court has determined that agency shop arrangements are "justified by the government's interest in promoting labor peace and avoiding the 'free rider' problem that would otherwise accompany union recognition." *Lehnert*, 500 U.S. at 520 21, 111 S.Ct. 1950; *see also Abood*, 431 U.S. at 222, 97 S.Ct. 1782.

Importantly, however, a union "[may] not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent." *Ellis v. Bhd. of Ry., Airline, & S.S. Clerks*, 466 U.S. 435, 447, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984). Instead, nonmembers may only be compelled to contribute a fair share of costs germane to collective bargaining. *See Bhd. of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113, 118-20, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963). As a corollary, nonmembers have a constitutional right to "prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Abood*, 431 U.S. at 234, 97 S.Ct. 1782; *see also, e.g., Commc'ns Workers v. Beck*, 487 U.S. 735, 762 63, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988); *Price v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers*, 927 F.2d 88, 90-91 (2d Cir.1991). "The amount at stake for each individual dissenter does not diminish this concern. For, whatever the amount, the quality of respondents' interest in not being [1125] compelled [to subsidize the propagation of political or ideological views that they oppose is clear." *Hudson*, 475 U.S. at 305, 106 S.Ct. 1066.

B.

In addition, procedural protections are constitutionally required in connection with a union's assessment and collection of an agency fee. In *Hudson*, the Court considered whether a union's procedure for the collection of agency fees adequately protected the distinction between germane collective bargaining costs and nonchargeable political expenditures. The Court explained that procedural protections were constitutionally required in this context for two reasons:

> First, although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement. Second, the nonunion employee—the individual whose First Amendment rights are being affected—must have a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim.

Hudson, 475 U.S. at 302 03, 106 S.Ct. 1066. The Court held that, "[s]ince the agency shop itself is "a significant impingement on First Amendment rights," . . . the government and union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights." *Id.* at 307 n. 20, 106 S.Ct. 1066 (emphasis added), *quoting Ellis*, 466 U.S. at 455, 104 S.Ct. 1883.

In *Hudson*, the defendant, a teacher's union, had implemented a fair share fee calculated as the proportion of chargeable expenditures in the preceding fiscal year, that is, those expenses related to collective bargaining and contract administration. The union also established a procedure for the consideration of nonmembers' objections. The union failed, however, to provide nonmembers with any explanation of how the fair share fee was calculated or explanation of the union's procedures. The Court held that the union's procedure was inadequate for three reasons: "because it failed to minimize the risk that nonunion employees' contributions might be used for impermissible purposes, because it failed to provide adequate justification for the advance reduction of dues, and because it failed to offer a reasonably prompt decision by an impartial decisionmaker." *Id.* at 309, 106 S.Ct. 1066.

First, the procedure at issue in *Hudson* was constitutionally deficient because it merely offered dissenters the possibility of a rebate; it failed to minimize the possibility that dissenters' funds would be used for an improper purpose in the first place. The Court stressed that the union should not be permitted to exact an agency fee from dissenters "without first establishing a procedure which will avoid the risk that their funds will be used, *even temporarily*, to finance ideological activities unrelated to collective bargaining." *Id.* at 305, 106 S.Ct. 1066 (emphasis added; internal quotation marks omitted), *citing Abood*, 431 U.S. at 244, 97 S.Ct. 1782 (concurring opinion).

Second, the union's procedures were held constitutionally deficient because employees had not been provided with sufficient information about the basis of the proportionate share: "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee." *Id.* at 306, 106 S.Ct. 1066. In *Abood*, the Court had stated [1126] that it was a union's duty to provide "the facts and records from which the proportion of political to total union expenditures can reasonably be calculated." 431 U.S. at 239-40, n. 40, 97 S.Ct. 1782, *quoting Allen*, 373 U.S. at 122, 83 S.Ct. 1158. The Court went further in *Hudson*, holding that the union was required to provide this information without awaiting an objection. *Hudson*, 475 U.S. at 306, 106 S.Ct. 1066.

Third, *Hudson* held that there must be a dispute resolution procedure. The Court stated that a union must provide both "a reasonably prompt *opportunity* to challenge the amount of the fee" as well as "a reasonably prompt decision by an *impartial decisionmaker*." *Id.* at 307, 310, 106 S.Ct. 1066 (emphasis added). The procedure at issue in *Hudson* was inadequate because it was controlled by the union and did not provide for an impartial decisionmaker. *Id.* at 308, 106 S.Ct. 1066 (describing the "'most conspicuous feature of the procedure is that from start to finish it is entirely controlled by the union'"). The

Court further held that a union must provide an "escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310, 106 S.Ct. 1066.

Drawing on these considerations, *Hudson* outlined three requirements for a union's collection of an agency fee: (1) "an adequate explanation of the basis for the fee," (2) a "reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," and (3) "an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310, 106 S.Ct. 1066.

C.

Surprisingly, in the case before us the majority characterizes the *Hudson* "test" as a "balancing test" or "reasonable accommodation test." The majority chooses, moreover, to highlight the Union's interests, stating that Congress has recognized the "important contribution of the union shop to the system of labor relations," and that "[t]he Supreme Court has underscored this Congressional policy by enforcing the *right* of a union, as the exclusive collective bargaining representative of its employees, to require nonunion employees to pay a fair share of the union's costs."

The majority puts its finger on the wrong side of the scale. A union has no "right" to the collection of agency fees, and *Hudson* does not call for merely a "reasonable accommodation" of employees' constitutional rights. From the framework described above, I view the Union's procedures much differently than the majority. I fear that the majority's account of the interests at stake, compounded by its view of the operative legal test, invites confusion. Indeed, it tampers with vitally important First Amendment principles.

1.

I cannot begin from the proposition that we are required to balance the "rights" of the Union against the rights of the employees it represents. While the majority insists that the only way "to faithfully characterize the procedures set out in *Hudson*" is to "balance" the Union's "right" to collect agency fees against the first amendment rights of non union employees [Maj. Op. __ n.3], it is the majority that is unfaithful to Hudson and her progeny. The Union's collection of fees from nonmembers is authorized by an act of legislative grace, not by any inherent "right" of the Union to the possession of nonmembers' funds. *See Davenport*, 551 U.S. at 185, 127 S.Ct. 2372. This should be clear to all. In *Davenport*, the Court explained that its agency fee cases "were not balancing constitutional rights in the manner [the union] suggests, for the simple reason that unions have no constitutional entitlement to the fees of nonmember employees." *Id.* Along similar lines, [1127] the Second Circuit has held that it is error to approach the agency fee issue "with a balancing test in which the cost to the union and the practicality of the procedures were to be weighed against the dissenters' First Amendment interests." *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335, 339 40 (2d Cir.1987).

Davenport considered a Washington state law prohibiting labor unions from using the agency-shop fees of nonmembers for election-related purposes unless the nonmember affirmatively consented. 551 U.S. at 185, 127 S.Ct. 2372. The Court considered whether this restriction on a union's spending of agency fees, as applied to public sector labor unions, violated the First Amendment. The Court emphatically determined that the restriction did not: "[t]he notion that this modest limitation upon an extraordinary benefit violates the First Amendment is, to say the least, counterintuitive." *Id.* at 184, 127 S.Ct. 2372. The union had no right to the funds; instead, "[w]hat matters is that public-sector agency fees are in the union's possession only because Washington and its union-contracting government agencies have compelled their employees to pay those fees." *Id.* at 187, 127 S.Ct. 2372.

Viewed properly, the collection of agency fees is authorized by legislative policy considerations pertaining to labor relations. *Locke*, 129 S.Ct. at 803; *Abood*, 431 U.S. at 222, 97 S.Ct. 1782. There are several justifications for an agency shop, but only one is implicated in this case: to prevent free riding by nonmembers who benefit from the union's collective bargaining activities. *See Davenport*, 551 U.S. at 181, 127 S.Ct. 2372 (describing the "primary purpose" of agency shop arrangements as prevention of free riding by nonmembers); *see also Abood*, 431 U.S. at 222, 97 S.Ct. 1782; *Ellis*, 466 U.S. at 447-48, 104 S.Ct. 1883. Political and ideological expenditures fall outside "the reasons advanced by the unions and accepted by Congress why authority to make union shop agreements was justified." *Lehnert*, 500 U.S. at 554, 111 S.Ct. 1950, *quoting Street*, 367 U.S. at 768, 81 S.Ct. 1784.

Thus, the majority is mistaken. The Union's interest in this case is not a "right" to nonmembers' funds. The Union's interest lies in receiving a fair contribution to its collective bargaining expenses. The Union has no legitimate interest, however, in collecting agency fees from nonmembers to fill its political war-chest.

2.

The majority describes *Hudson* as a "reasonable accommodation test." The majority points to the following statement from *Hudson*: "[t]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." 475 U.S. at 302, 106 S.Ct. 1066. The majority also states that a union need not take "any and all steps demanded by fee payers." The majority looks to our decision in *Grunwald v. San Bernardino City Unified School District*, which stated: "[t]he test . . . is not whether the union and the [employer] have come up with the system that imposes the least burden on agency fee payers, regardless of cost." 994 F.2d 1370, 1376 n. 7 (9th Cir.1993).

But there is a wide gap between taking "any and all steps demanded by fee payers"—that is, a least-restrictive means test—and what the majority endorses. While Hudson does not require a union to adopt procedures that impose the least intrusive burden on fee payers possible, the majority affords the union undue leniency. *See, e.g., Andrews*, 829 F.2d at 339-40. The majority ignores *Hudson*'s [1128] instruction that, because employees' First Amendment interests are implicated by the collection of an agency fee, "the procedure [must] be *carefully tailored* to minimize the infringement." *Hudson*, 475 U.S. at 302-03, 106 S.Ct. 1066 (emphasis added). To eliminate any doubt, in the footnote appended to this statement, the Court cites several cases holding that when First Amendment rights are implicated, the government must avoid burdening those rights. *Id.* at 303, n. 11, 106 S.Ct. 1066, *citing Roberts v. United States Jaycees*, 468 U.S. 609, 637, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); *Elrod v. Burns*, 427 U.S. 347, 363, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Kusper v. Pontikes*, 414 U.S. 51, 58-59, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973); *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

Hudson emphasized, moreover, that "procedural safeguards often have a special bite in the First Amendment context." 475 U.S. at 302 n. 12, 106 S.Ct. 1066 (internal quotation marks and alteration omitted). In the agency fee context, *Hudson* described the goal of procedural protections as to "minimize the risk that nonunion employees' contributions might be used for impermissible purposes" *even temporarily*, *id.* at 305, 309, 106 S.Ct. 1066, and to "facilitate a nonunion employee's ability to protect his rights," *id.* at 307 n. 20, 106 S.Ct. 1066. I therefore conclude that the majority's "reasonable accommodation test" is misguided and is inconsistent with case law that we are required to follow.

II.

The Union's procedures in this case should be evaluated in light of the principles set forth in *Hudson* and the legitimate interests at stake. As the majority has already set forth the facts of this case in some detail, I recite them only where particularly relevant to my views or where additional detail is warranted. I also seek to draw more attention to the well reasoned decision of the district court.

A.

Pursuant to *Hudson*, the Union issues a notice to agency fee payers every June. At issue in this case is the Union's June 2005 *Hudson* notice. That notice set the agency fee to be extracted from nonmember's paychecks at 99.1% of full union membership dues. Nonmembers who objected to paying for nonchargeable expenses would pay a reduced agency fee, set at 56.35% of full union membership dues. The agency fees described in the notice were in effect until the following July, when a new *Hudson* notice was to become effective. The June 2005 *Hudson* notice also provided an objection period of thirty days, during which nonmember fee payers could object to the collection of the full agency fee and elect to pay the reduced agency fee. Some of the plaintiffs in this action objected to the June 2005 *Hudson* notice, while others did not.

In the Summer of 2005, shortly after the expiration of the period for objection to the June 2005 *Hudson* notice, the Union's legislative bodies began discussing a temporary dues increase. The proposal was described as an "Emergency Temporary Assessment to Build a Political Fight-Back Fund." The agenda for a July 30, 2005 Council Meeting described the purpose of the assessment as follows: "[t]he funds from this emergency temporary assessment will be used specifically in the political arenas of California to defend and advance the interests of members of Local 1000. . . ." The agenda continued to describe:

> These temporary emergency assessments are made necessary by political attacks on state employees and other public workers launched by Governor Schwarzenegger and his allies which threaten the wages, benefits and working [1129]

> conditions of Local 1000 members, and undermine the services they provide to the people of California.

The Union contemplated that the "Political Fight-Back Fund" would not be used for the "regular costs of the union . . . such as office rent, staff salaries or routine equipment replacement." Instead, the Fund would be used "for a broad range of political expenses."

The Union approved the temporary assessment at the end of August 2005. The Union's yearly *Hudson* notice had been issued in June 2005, and that notice did not mention the possibility of the later-enacted temporary assessment. After passage of the temporary assessment, the Union sent a letter to members and nonmembers, dated August 31, 2005, informing them that "Local 1000 delegates voted overwhelmingly for a temporary dues increase to create a Political Fight-Back Fund." The letter stated that the funds collected from the dues increase would be used for several political purposes: (1) to defeat two propositions appearing on the November 2005 ballot (Propositions 75 and 76); (2) to "defeat another attack on [the] pension plan" in June 2006; and (3) "[i]n November 2006 . . . to elect a governor and legislature who support public employees and the services [they] provide." The letter explained that the $45 per month cap on dues would not apply to the temporary assessment. For sake of clarity, I point out that this letter did not constitute "notice" as contemplated in *Hudson*. The letter did not provide an explanation for the basis of the additional fees being imposed, and it did not provide nonmembers with an opportunity to object to the additional fees.

After receiving the Union's letter, some nonmembers attempted to object to the temporary assessment. For example, plaintiff Dobrowolski contacted the Union to lodge his objection to the "Political Fight-Back Fund." He was told, in effect, that there was nothing he could do about it; he was not allowed to object. The Union thereafter sent a letter to nonmembers, like plaintiff Dobrowolski, who attempted to object to the increase in fees. That letter, dated October 27, 2005, stated in part:

> The Union has received your objection to the dues increase. We understand that you are a political objector and a fee payer in the Union and that you have raised an objection to paying this increase because you believe the money will be directed solely to political activities by the Union. We understand your frustration about paying a little more to the Union when you have not seen a new contract with a pay increase. However, we hope that by explaining the Union's position concerning this dues and fees increase, you will better understand our position. . . .
>
> When we have a campaign that is split between political actions and collective bargaining actions the Union is required by law to annually audit the expenditures for those activities; the Union will fully comply with this requirement. However, the Supreme Court has stated that this audit must occur at the end of the fiscal year in which the activities take place, because next year's objecting fee-payer rate must be based on that audit.
>
> This campaign will entail much workplace organizing divided over two fiscal years. At the end of each year, the Union's expenses for these activi-

> ties will be audited, and the amount of expense which is not germane to collective bargaining will be used to set the objecting fee-payer rate for the next year. Presently you are an objecting fee payer who pays the audited rate for this year. Next year, you will be able to exercise your objection again and pay the audited [1130] rate set for that year, based on the Union's expenditures this year. That rate will fully account for any political actions of the nature to which you have objected.

The temporary assessment took effect at the end of September 2005. At that time, the Controller of the State of California, defendant Steve Westly, began deducting the additional fees automatically from all nonmember employees' paychecks. Although the assessment was "temporary," it was certainly not of short duration, lasting from September 2005 until the end of December 2006.

B.

In November 2005, plaintiffs initiated this action in the United States District Court for the Eastern District of California, contending that the temporary assessment violated their First, Fifth and Fourteenth Amendment rights. Plaintiffs alleged, among other things, that the temporary assessment constituted a seizure of their money for nonchargeable political expenses, without constitutionally required procedural safeguards. The district court granted a preliminary injunction to plaintiffs. On cross motions for summary judgment, the district court entered summary judgment in plaintiffs' favor.

There are several important features of the district court's summary judgment. First, the district court addressed the burden imposed by the temporary special assessment. The Union argued that nonmembers who had objected to the June 2005 *Hudson* notice were assessed only a 14.09% increase in the deduction from the objector's salary. The district court opined that the figure was "somewhat misleading" because it ignored the fee increase imposed on nonunion employees who had not objected to the Union's June 2005 *Hudson* notice. The district court indicated that the Union's quantification of the temporary assessment was misleading in other respects as well, and that the actual increase in fair share fee for nonmembers ranged, on average, from 25% to 33%. The district court deemed this "a material change in the amount of funds nonunion employees were required to contribute to Union expenditures." The district court concluded, "the fair share fees paid by both objectors and nonobjectors actually increased by a much greater margin than Defendants would like to suggest."

Second, the district court discussed the characterization of the temporary special assessment. Plaintiffs asserted that the fund was intended solely for political and ideological purposes. The Union characterized the assessment as "an ordinary dues and fees increase" because, in retrospect, some of the expenses funded through the temporary assessment were eventually deemed chargeable to nonmembers. The district court thought the Union's position "def [ied] logic." The Union had described the proposed assessment as a political fund, and specifically stated that the fund was not to be used for regular costs.

Third, taking all of the above together, the district court concluded that the June 2005 notice did not provide potential objectors with sufficient information to gauge the propriety of the Union's fee, in light of the temporary special assessment. The June 2005 *Hudson* notice could not provide adequate notice as to the temporary assessment because it relied on categories that were not relevant to the temporary assessment. According to the Union's statements, the temporary special assessment was intended for a specific purpose and would not be used for regular expenses. The district court pointed out that, "after implementing the increase, the Union took the position that nonunion employees [1131] had already been given an opportunity to make an informed decision as to the Assessment by means of the 2005 *Hudson* notice. The Union now turns a blind eye to the inconsistency inherent in asking non-union employees to compare apples, in the form of the prior year's financials, to oranges, in the form of a new Assessment."

Finally, the district court concluded that the appropriate remedy was a second *Hudson* notice, relying on *Wagner v. Professional Engineers in California Government*, 354 F.3d 1036, 1041 (9th Cir. 2004). This remedy had to be made available to nonmembers regardless of whether they had objected to the June 2005 *Hudson* notice, because: "[i]n order for any nonunion employees' failure to object to have any legal significance, the 2005 *Hudson* Notice must have been valid and sufficient to cover the Assessment." The district court held that objectors to the second *Hudson* notice would be entitled to a refund, with interest, of any withheld amounts.

III.

In this case, the Union failed to protect adequately the First Amendment rights of nonmembers from whom it collected an agency fee. In collecting agency fees from nonmembers, the Union is subject to constraints that are both procedural and substantive in nature. *See Grunwald*, 994 F.2d at 1373. Procedurally, the Union did not provide nonmembers with sufficient information to gauge the propriety of the agency fee. The Union's June 2005 *Hudson* notice was insufficient in light of the temporary assessment. Notably, the Union adopted no other procedures to protect nonmembers' First Amendment rights upon imposition of the temporary assessment. Nonmembers were provided no additional notice, opportunity to object, dispute resolution procedure, and so forth. Compounding these procedural failures, there is a substantive problem. The temporary assessment is suspect, because it was instituted shortly after the June general *Hudson* notice and was explicitly and exclusively intended to fund the Union's political activities. The temporary assessment was a special purpose fund that would not be used for regular Union costs and therefore represented a departure from the Union's typical spending regime.[1] I do not believe the Union sufficiently minimized the risk that nonmembers' funds would be used to subsidize political and ideological activities in light of these circumstances.

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[1] The majority avers that the special assessment does not represent a substantial departure from the Union's ordinary spending. Subsequent audits, however, revealed that a very substantial portion of the Union's assessment, 72.6% in 2005 and 81.2% in 2006, was used for non chargeable purposes. In contrast, 31.2% of the Union's total expenses was determined to be non-chargeable in 2005, and 39.6% was deemed non-chargeable in 2006. The special assessment, therefore, cannot be described as being consistent with the Union's usual spending—especially when the Union explicitly stated that the assessment was necessary for political purposes.

A.

I first consider the adequacy of the Union's June 2005 *Hudson* notice in light of the temporary assessment. The June 2005 Hudson notice provided, in part:

> Effective July 1, 2005 through June 30, 2006, the fee will be no more than 99.1% of regular membership dues. Regular monthly membership dues are currently 1.0% of monthly gross salary and are presently capped at a maximum of $45 per month. Dues are subject to change without further notice to fee payers.
>
> Effective July 1, 2005 through June 30, 2006 (the "2005 6 Fee Payer Year") [the Union] will charge fee payers who object to expenditures not germane to [1132] collective bargaining a fee of no more than 56.35% of regular membership dues for that salary level.

The notice provided, in addition, for a "Political Action Reduction:" "Fee payers are also entitled to have their fees reduced by the pro rata portion of the fee that goes to the Political Action Fund that [the Union] sets aside for contributions to candidates and initiative campaigns, and other partisan political activities."

To provide a point of comparison, the Union's June 2006 Hudson notice, issued after the temporary assessment had been enacted, provided as follows:

> Effective July 1, 2006 through June 30, 2007, the fee will be no more than 99.1% of regular membership dues. Regular monthly membership dues are currently 1.0% of monthly gross salary and are presently capped at a maximum of $45

> per month. Additionally, a temporary assessment of 1/4 of 1% of monthly gross salary is being collected through December 31, 2006. Dues are subject to change without further notice to fee payers.
>
> Effective July 1, 2006 through June 30, 2007 (the "2006-7 Fee Payer Year") [the Union] will charge fee payers who object to expenditures not germane to collective bargaining a fee of no more than 68.8% of regular membership dues for that salary level.

Regarding the "Political Action Fund," the 2006 *Hudson* notice provided that fee payers were also entitled "to have their fees reduced by the pro rata portion of the fee that goes to the Political Action Fund. . . ."

The Union submits that the Supreme Court has approved the retrospective method by which it calculates the yearly agency fee: a "look-back" procedure, by which the Union sets the agency fee for the upcoming year according to the proportion of chargeable versus nonchargeable expenditures in the prior year. However, the Union's June 2005 *Hudson* notice was not adequate to provide an explanation of the basis for the agency fee extracted from nonmembers' paychecks for the temporary assessment. To reiterate the obvious, the June 2005 *Hudson* notice provided no information regarding the temporary assessment, as it was enacted subsequently, in August 2005. The Union would respond that the notice was adequate to cover such future contingencies. How could that be? The temporary special assessment resulted in approximately a 25% increase in fair share fees—a fairly substantial increase. Because the temporary assessment was exempted from the dues cap, higher earning employees might experience an effective or actual increase that was even greater. Moreover, while the assessment was "temporary," it was in effect for the bulk of the 2005 fee year, from the end of September 2005 until commencement of the next fee year in July 2006.

The district court further held that the fee increase was material, and I agree. The temporary special assessment might therefore have affected a fee payer's decision to object pursuant to the June 2005 *Hudson* notice. *See, e.g., Dashiell v. Montgomery County*, 925 F.2d 750, 756 (4th Cir.1991) ("The test of adequacy of the initial explanation to be provided by the union is . . . whether the information is sufficient to enable the employee to decide whether to object"). Indeed, because the Union refused to give nonmember employees an opportunity to object when information about the temporary assessment was disclosed, these nonmembers were essentially left in the "dark" about the nature of the agency fee during the time period in which they were required to file objections. *See Hudson*, 475 U.S. at 303, 106 S.Ct. 1066 (emphasizing that unions cannot leave "nonunion employees in the dark about the source of the figure for the agency fee"). In other words, even though the special [1133] assessment significantly altered the magnitude and intended use of the agency fee, the Union and the majority believe that nonmember employees were required to object before the material information was revealed. Such an approach simply cannot be reconciled with the procedures set forth in *Hudson*. *See id.; cf. Locke v. Karass*, 382 F.Supp.2d 181, 190 (D.Me.2005) (explaining that the use of a previous year's financial audit to set the percentage of chargeable fees would violate *Hudson*, when a union "cherry pick[s]" certain financial data, and fails to disclose other material information, in an effort to increase fees), *affirmed by* 498 F.3d 49 (2007) *and by* 555 U.S. 207, 129 S.Ct. 798, 172 L.Ed.2d 552 (2009).

The Union would respond, I venture, by asserting that the temporary assessment did not alter the agency fee as a percentage of total union dues. The June 2005 *Hudson* notice disclosed that the agency fee was 99.1% of membership dues, and that the objectors' agency fee was 56.35% of membership dues. The temporary assessment did not affect these percentages. But such an argument rests on the faulty premise that, if nonmembers' fees remain constant as a percentage of members' dues through a given fee year, any absolute increase in fees is protected from scrutiny by the yearly *Hudson* notice, that is, that the proportionate share is what matters, and because this was not altered there can be no constitutional violation.

I am not convinced that the proportionate share is all that matters in evaluating the adequacy of a *Hudson* notice. From the standpoint of a potential objector, the magnitude of the increase in fees imposed by the temporary assessment could very well be material. This increase, as an absolute amount, could affect a nonmember's decision to object or not to object even if the percentage fee remained static. And these nonmembers are the ones whose First Amendment rights are in jeopardy–not the Union's. Moreover, the temporary assessment was exempted from the cap on dues. Thus, even though the fair share fee remained constant as a basic percentage under the temporary assessment, because the assessment was *exempted* from the $45 per month cap on dues, some employees would in fact experience a proportionately greater share in monthly fee deductions. This is inconsistent with a static-percentage justification for the Union's failure to provide additional notice regarding the temporary assessment.

Furthermore, by exempting the temporary assessment from the cap, the Union acted contrary to the June 2005 *Hudson* notice. The June 2005 *Hudson* notice, stated: "currently 1.0% of monthly gross salary and are presently capped at a maximum of $45 per month." Exceptions from the cap, or the elimination of it, was not contemplated in the June 2005 *Hudson* notice. The Union's June 2005 *Hudson* notice also stated: "[d]ues are subject to change without further notice to fee payers." I cannot put much weight in this sweeping reservation of assumed authority; in any event, the notice did not disclose that the cap could be eliminated. For these additional reasons, I conclude that the temporary assessment might be a material factor in a nonmembers' decision to object.

I conclude that the Union's June 2005 notice did not fulfill its obligations under *Hudson*. The purpose of a *Hudson* notice is to enable informed consent or objection. *See Cummings v. Connell*, 316 F.3d 886, 895 (9th Cir.2003), *cert. denied*, 539 U.S. 927, 123 S.Ct. 2577, 156 L.Ed.2d 604 (2003) (holding that the Hudson notice was designed to provide nonmembers with information necessary to evaluate whether to object to a union's calculation of chargeable expenses); *Hohe v. Casey*, 956 F.2d 399, 410 (3d Cir.1992) ("the issue is whether [1134] the notice provided nonmembers with . . . sufficient information to determine whether they were only being compelled to contribute to chargeable activities"). The Union's June 2005 *Hudson* notice was inadequate to provide fee payers with a basis on which to adjudge the propriety of the Union's agency fee, and to decide whether or not to object.

Because the Union's June 2005 Hudson notice was inadequate, an employee's failure to object to it does not constitute an effective waiver, an abandonment of a known right. *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 430 (6th Cir.1990). Until *Hudson*'s requirements are satisfied, employees must be afforded subsequent opportunities to object. *See Mitchell v. L.A. Unif. Sch. Dist.*, 963 F.2d 258, 261 63 (9th Cir.1992).

The June 2005 *Hudson* notice was not adequate to provide notice as to the temporary assessment for an additional reason, which warrants separate attention. The temporary assessment was a special purpose fund. The Union envisioned the temporary assessment as a political fundraising vehicle, to build a "Political Fight Back Fund." The Union contemplated that the temporary assessment would provide a distinct source of capital for political activities and that it would not be used for the regular expenses of the union.[2] Recognizing the unique character of the temporary assessment has two implications.

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[2] The majority acknowledges that the Union's August 2005 letter to members and agency fee payers specifically stated that the fee increase would be used for political activities. In fact, that letter makes no mention whatsoever of any non political reason for the increase. Nevertheless, based on the October 2005 letter, the majority reasons that the Union "intended to split the increase 'between political actions and collective bargaining actions.'" Maj. Op. at ___. The October letter, however, does not state that the fee increase would be split between political and collective bargaining activities. Instead, the letter indicates that the Union would be undertaking a "year-long campaign" that

First, the June 2005 *Hudson* notice could not be adequate to enable nonmembers' informed objection to the agency fee. The June 2005 *Hudson* notice contemplated ordinary expenditures; the temporary special assessment stood apart from that. As the district court stated, the union asked nonmembers to compare "apples, in the form of the prior year's financials, to oranges, in the form of a new [a]ssessment, an [a]ssessment which was not to be utilized for Union operations but was instead earmarked for discrete political purposes." Even if agency fees remained constant as a percentage of total member dues, nonmembers might well object to paying increased fees for purely political purposes; for example, they might object in light of the departure from the Union's normal spending regime.

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would be "split" between both political and non political functions. Nothing in the letter states that the "campaign" would be funded exclusively by the assessment. In fact, the Union's letter then identified a 2004 "Call the Governor" program, which apparently was funded by the Union's general fund from the previous year, as an example of a non political "campaign" activity. Thus, when the August and October letters are read together, it appears the Union intended to use the fee increase to fund political aspects of the campaign, while it intended to fund non political activities with general member and agency fees.

> Similarly, the majority misapprehends the record when it suggests that the fee assessment contained no spending limitations. Maj. Op. at __. When the Union decided to increase fees, its budget committee indicated that the increase would "not be used for regular costs of the [U]nion." The agenda for the counsel meeting, wherein the Union resolved to increase fees, further states that "[t]he funds from this emergency temporary assessment will be used specifically in the political arenas of California." These appear to be spending limitations.

[1135] Second, as a substantive matter, the Court has repeatedly stressed that a union may extract from nonmembers "only those fees and dues necessary to performing the duties of an exclusive representative of the employees in dealing with the employer on labor management issues." *Price*, 927 F.2d at 90 91 (internal quotation marks omitted). In *Lehnert*, the Court outlined a framework for evaluating whether an activity was germane to a union's role as exclusive bargaining agent: "chargeable activities must (1) be "germane" to collective bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." 500 U.S. at 519, 111 S.Ct. 1950.

To protect the distinction between chargeable and non-chargeable activities, a union is required to adopt procedures that *minimize* the risk that nonmembers will be compelled to subsidize political or ideological activities with which they do not agree.[3] In *Hudson*, the Court explained, "[t]he Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Hudson*, 475 U.S. at 305, 106 S.Ct. 1066; *Abood*, 431 U.S. at 244, 97 S.Ct. 1782 (concurring opinion).

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[3] The majority incorrectly concludes that Plaintiffs' appeal "must fail" because chargeability of the assessment is "immaterial" to their procedural *Hudson* challenge. Maj. Op. at __ n.4. While it is true that the Plaintiffs in this case do not raise a direct challenge to the Union's chargeability determinations, this does not mean that the political nature of the Union's special assessment is irrelevant. Indeed, the *Hudson* procedures were adopted to provide nonunion employees with a fair opportunity to object to a union's use of agency fees for political, ideological, and otherwise non-chargeable activities. *See* 475 U.S. at 306, 106 S.Ct. 1066 ("Basic considerations of fairness, as well as concern for the First Amendment rights at stake, . . . dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee"). Here, the Union's decision to raise fees to fund political activities is relevant in determining whether the Union provided sufficient

The temporary assessment was contemplated as a political fundraising vehicle; it therefore cannot be justified by the interest in preventing nonmembers from free riding on the Union's collective bargaining efforts. The temporary assessment clearly burdened the speech of nonmembers. But the Union undertook no efforts, in connection with the imposition of the temporary assessment, to minimize the impact on nonmembers' First Amendment rights. Taking these considerations together, I conclude that, in connection with the imposition and collection of the temporary assessment, the Union did not fulfill its obligation to be mindful of nonmembers' First Amendment rights.

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information for nonunion employees to "gauge" whether or not to object.

The majority's reliance on *Wagner*, 354 F.3d at 1046 47, is mispled. While *Wagner* observed that a procedural *Hudson* challenge raises different questions than a challenge to a union's chargeability determinations, *Wagner* does not stand for the proposition that the potential chargeability of a union's mid-year fee increase cannot be considered in determining whether a union has satisfied the procedural requirements set forth in *Hudson*. *See id.*; *Hudson*, 475 U.S. at 306, 106 S.Ct. 1066.

The Union and the majority seek to evade the fact that the temporary assessment was enacted to fund political activities by arguing that the fund was ultimately used for some expenses that were chargeable to nonmembers.[4] I agree with the district court's

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[4] The Union's ideological challenge to Proposition 76 cannot be categorized, as the majority attempts, as an expense chargeable to objecting agency-fee payers. According to the majority, expenses related to the Union's political challenge to this ballot measure might be considered chargeable because Proposition 76 "would have effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances." Maj. Op. at ___ n.2. A review of Proposition 76, however, reveals that any connection between the Union's challenge was too attenuated to its collective bargaining agreement to be considered a chargeable expense. The purpose of the ballot measure was to limit the annual amount of total state spending to the prior year's spending plus a reasonable amount of growth. *See* Sec'y of the St. of Cal., Official Voter Information Guide: Special Statewide Election 60 (2005). It also would have set aside budget surpluses for future use. *Id.* To achieve these initiatives, Proposition 76 allowed the governor to reduce spending under certain circumstances. For instance, if passed, the proposition would have given the Governor limited "authority to reduce appropriations" for future state contracts, collective bargaining agreements, and entitlement programs. *Id.* Thus, properly understood Proposition 76 was a ballot measure related to the allocation of tax revenue for funding government activities, which included the amount of financial support available to fund public employment. *See id.*

To be sure, there are some limited circumstances where a union's political activities can be deemed chargeable. According to the Supreme Court, lobbying or other political activities are chargeable when they directly relate to "ratification of negotiated agreements by the proper . . . legislative body" or "to acquiring appropriations for approved collective-bargaining agreements." *Lehnert*, 500 U.S. at 520, 111 S.Ct. 1950. Where, however, as in the instant case, the "challenged . . . activities relate . . . to financial support of . . . public employees generally, the connection to the union's function as bargaining represenassessment of the Union's [1136] post hoc rationalization: "[f]ollowing the union's logic it should be required only to show that some small fraction of this fund was used for chargeable purposes in order to justify subverting its *Hudson* responsibilities." The district court further reasoned that, even if the temporary assessment was not intended *solely* for political purposes, it was indeed intended *predominantly* for political purposes. As such, the district court continued, "it is clear that the Union's intent was to depart drastically from its typical spending regime and to focus [the temporary special assessment funds] on activities that were political or ideological in nature."

In sum, the Union's procedures were not adequate under the circumstances. The June 2005 *Hudson* notice was inadequate to provide nonmembers with sufficient information from which to evaluate the propriety of the Union's agency fee. After enacting the temporary special assessment, the Union made no effort whatsoever to minimize the infringement of nonmembers' rights. The Union did not provide notice regarding the temporary assessment; the Union also did not provide nonmembers with an opportunity to object to the temporary assessment.

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tative is too attenuated to justify compelled support by objecting employees." *Id.* Accordingly, contrary to the majority's contention, the district court and I do not "conflate" political expenses with non chargeable expenses. Maj. Op. at ____ n.2. We simply recognize that the Union's intended uses for the assessment, all of which pertained to core political activities such as the Union's challenge to Proposition 76, cannot be construed as legally chargeable. Additionally, it is peculiar that the majority even makes the assertion that the Union's political expenses would be chargeable if, as the majority avers, "chargeability is immaterial" to the instant case. Maj. Op. at ___ n.4.

The Union did not provide a procedure for resolving disputes and did not place disputed amounts in escrow. Indeed, when nonmembers attempted to object to the temporary assessment, they were refused a forum for their dispute and were never provided with the opportunity to obtain the decision of a neutral hearing officer.

IV.

This brings me to the crux of the Union's argument: that *Hudson* approved [1137] calculating an agency fee as the proportion of chargeable to nonchargeable expenses in the prior fiscal year. The Union asserts that the prior-year method is virtually required here, as it is a large public sector union and must calculate its agency fee on the basis of audited financial reports. Because of the audit requirement, moreover, the Union asserts that it could not prospectively apportion the temporary assessment between chargeable and nonchargeable expenses.

The majority agrees that the Union complied with its obligations. The majority recites that "absolute" precision cannot be expected or required in the calculation of an agency fee, and that the Union cannot be "faulted" for calculating its agency fee on the basis of the prior fiscal year's expenditures. Further, the majority states that the Union could not deviate from the prior-year method of calculating the agency fee with respect to the special assessment. The majority explains that the prior year method makes lag inherent; in any given year, an objector might be "underpaying or overpaying," but "the inevitable effect of the *Hudson* method is that these over-and undercharges even out over time."

This strikes me as a strange argument when dealing with a First Amendment challenge. First, the *Hudson* notice procedure is not per se adequate to protect the rights of nonmembers in all situations. Instead, where, as here, there is a substantial deviation from the normal *Hudson* process, adaptation is required. Second, the prior year calculation method does not establish the adequacy of the June 2005 *Hudson* notice nor does it demonstrate that the Union's procedures were adequate when viewed as a whole.

A.

We should not measure the Union's conduct by the discrete *Hudson* procedures alone. *Hudson* establishes a floor. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 17, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990). In *Davenport*, the Court stressed, "we have described *Hudson* as "outlin[ing] a minimum set of procedures by which a [public sector] union in an agency shop relationship could meet its requirement under *Abood*."" 551 U.S. at 185, 127 S.Ct. 2372.

Here, the temporary assessment was not like the Union's ordinary dues and not like the facts presented in *Hudson*. Several features of the special assessment distinguish this case. The temporary assessment was imposed mid year and not in the normal course of the *Hudson* process. The temporary assessment imposed a material increase in agency fees over those contemplated in the *Hudson* notice, and was exempt from the dues cap (which was inconsistent with the *Hudson* notice). *Hudson* did not consider a fee increase outside of a normal periodic notice process. Likewise, *Hudson* did not contemplate a special-purpose assessment, as here. Even assuming the Union did here what was done in *Hudson*, it could not be sufficient to satisfy its duties in light of the unique circumstances of this case.

I cannot agree with the proposition that the Union's June 2005 *Hudson* notice satisfied the Union's obligations to nonmembers until issuance of the next yearly *Hudson* notice. The Union's mid-year conduct cannot be insulated from scrutiny. Rather, there must be some limitation on a union's imposition of fee increases between *Hudson* annual notices.

B.

The Union contends that it complied with the procedures set forth in *Hudson*, because the Court approved the calculation of an agency fee based on the proportion of the prior year's chargeable to nonchargeable expenditures. Indeed, in a footnote, the Court stated that a union "cannot be faulted for calculating its fee on [1138] the basis of its expenses during the preceding year." *Hudson*, 475 U.S. at 307 n. 18, 106 S.Ct. 1066. The Union represents, furthermore, that its hands were tied with regard to the temporary assessment, because it is required to base its agency fee calculation on audited financial statements. *See Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 812-13 (9th Cir.1997), *cert. denied*, 524 U.S. 904, 118 S.Ct. 2060, 141 L.Ed.2d 138 (1998); *Prescott v. County of El Dorado*, 177 F.3d 1102, 1106-09 (9th Cir.1999), *vacated and remanded on other grounds*, 528 U.S. 1111, 120 S.Ct. 929, 145 L.Ed.2d 807, *reinstated*, 204 F.3d 984 (9th Cir.2000).

The prior year calculation method used here does not satisfy all of the Union's obligations, however. The Union's allocation of expenses as chargeable or nonchargeable presents a distinct issue in the adequacy of its *Hudson* notice. *See, e.g.*, *Seidemann v.*

Bowen, 499 F.3d 119, 127 (2d Cir.2007) (there is a "clear distinction between the adequacy of a union's notice . . . and the propriety of a union's chargeability determinations"); *Hudson v. Chicago Teachers Union*, 922 F.2d 1306, 1309, 1314 (7th Cir.1991) (pointing out that a party had confused adequacy of the notice with the accuracy of the fee itself). Thus, even if the Union "cannot be faulted" for relying on prior year expenditures in calculating the agency fee, it is not relieved from its other *Hudson* obligations. The Union must still provide adequate notice to enable an informed decision, an opportunity to lodge objections, a prompt hearing on objections by a neutral decisionmaker, and escrow of any amounts in dispute. Even if we look only to compliance with *Hudson*, therefore, the Union still falls short of the mark.

I recognize that the Union, in relying on prior-year expenditures as the basis for its agency fee, is subject to an audit requirement. In my view, application of the audit requirement relates to the appropriate remedy in this case, a question we do not reach. A district court, with a proper record, could evaluate the audit requirement in light of the temporary assessment. Indeed, the purpose of an audit is to verify that a union actually spent the amount of money it claims; the audit is not intended to verify the union's allocation as a "legal, not an accounting, decision regarding the appropriateness of the allocation of expenses to the chargeable and non chargeable categories." *Andrews*, 829 F.2d at 340; *accord Gwirtz v. Ohio Educ. Ass'n*, 887 F.2d 678, 682 n. 3 (6th Cir.1989); *Ping v. Nat'l Educ. Ass'n*, 870 F.2d 1369, 1374 (7th Cir.1989). In any event, the audit requirement does not relate to the other *Hudson* protections implicated by this case, and is ultimately of limited help to the Union. Even a temporary violation of the First Amendment is a significant violation.

V.

The majority construes the issue in this appeal as "whether a union is required . . . to send a second notice when adopting a temporary, mid-term fee increase." By framing narrowly the issue in this case, the majority shifts attention to the remedy adopted by the district court. But the district court's remedy is only one consideration in this case—one we do not even reach—and should not be set up as a strawman for attack.

In this case, the Union's provision of an annual *Hudson* notice was insufficient to enable nonmembers to protect their First Amendment rights upon imposition of the temporary assessment. The Union, furthermore, made no effort to minimize the infringement of nonmember's First Amendment rights despite substantially increasing the fees extracted from their paychecks. I believe that the majority's opinion [1139] does not carry out the principles of *Hudson*. I therefore dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. CALIFORNIA

No. 2:05 cv 02198 MCE KJM.

DIANNE KNOX; WILLIAM L. BLAYLOCK;
ROBERT A. CONOVER; EDWARD L. DOBROWOLSKI, JR.;
KARYN GIL; THOMAS JACOB HASS; PATRICK JOHNSON;
and JON JUMPER, on Behalf of Themselves and
the Class They Seek to Represent,
Plaintiffs,

v.

STEVE WESTLY, CONTROLLER, STATE OF CALIFORNIA;
AND CALIFORNIA STATE EMPLOYEES ASSOCIATION,
LOCAL 1000, SERVICE EMPLOYEES INTERNATIONAL
UNION, AFL CIO CLC,
Defendants.

March 28, 2008.

MEMORANDUM AND ORDER

MORRISON C. ENGLAND, JR., *District Judge*.

[1] Through the present action, Plaintiffs, state employees, seek redress against Defendants, Steve Westly, the Controller of the State of California ("Controller"), and California State Employees Association, Local 1000, Service Employees International Union, AFL-CIO, CLC ("the Union"), for violations of their First, Fifth, and Fourteenth Amendment rights

under 42 U.S.C. § 1983 by, *inter alia*, using Plaintiffs' monies to support political causes without satisfying constitutionally required procedural safeguards as compelled by ***Chicago Teachers Union v. Hudson***, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986).

Plaintiffs seek Summary Judgment as to the case in its entirety, or, alternatively, Summary Adjudication of individual claims, arguing that Defendants failed to provide any notice to employees regarding the basis for the temporary assessment imposed by the Union from September 2005 through December of 2006. Defendants filed a cross motion seeking Partial Summary Judgment as to the nonobjecting class of Plaintiffs, arguing that those Plaintiffs consented to the use of their wages to fund the Union's temporary assessement when they failed to object after receiving the Union's annual ***Hudson*** notice. Defendants also ask that this Court grant Summary Adjudication limiting the relevant time period of Plaintiffs' claims to September 2005 through June 2006 (inclusive). For the reasons set forth below, Plaintiffs' Motion is granted, and Defendants' Motion is granted in part and denied in part.[1]

BACKGROUND

Though the following underlying facts material to the disposition of this Motion are undisputed, the Court is aware that the parties' characterizations of those facts diverge greatly.

Plaintiffs represent two classes of nonunion employees, those who objected to the Union's June

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[1] Because it is determined that oral argument would not be of material assistance, the Court ordered this matter submitted on the briefing. E.D. Cal. Local Rule 78 230(h).

2005 *Hudson* Notice ("objectors") and those who did not ("nonobjectors") (collectively "Plaintiffs"). *See* Pls.' Statement of Undisputed Material Facts and Defs.' Response Thereto, No. 11 (UF). Defendants are the State Controller and the Union. *Id.*, Nos. 8 9.

The State of California has recognized the Union as the exclusive bargaining agent for the Plaintiffs and other State employees in bargaining units designated as Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20, and 21. *Id.*, No. 16. The Union and the State of California have entered a series of Memoranda of Understanding ("MOUs") controlling the terms and conditions of employment for Plaintiffs. *Id.* One such MOU includes a provision requiring that all State employees in these Bargaining Units join the Union as formal Union members, or if opting not to join, have deducted from their wages a proportionate amount of agency fees. *Id.*, No. 17.

The Union issues a notice pursuant to *Hudson* every June. This constitutionally required "*Hudson* notice" is meant to provide nonmembers with, *inter alia*, an adequate explanation of the basis of the agency fee. *Hudson* at 310.

[2] Additionally the notice provides that, for thirty (30) days after it is issued, nonunion employees can object to the collection of full union dues and can elect instead to have only the reduced rate deducted during the upcoming fee year. Finally, during that 30 day period, nonmembers can also challenge the Union's calculation of its chargeable and nonchargeable expenses. Such challenges are resolved by an impartial decisionmaker. *UF*, No. 18.

In June, 2005, the Union issued its annual *Hudson* notice ("2005 *Hudson* Notice"). This notice did not indicate that a temporary assessment would be included in the 2005-06 dues and fees, but stated that "[d]ues are subject to change without further notice to fee payers." *Id.*, No. 27.

The 2005 *Hudson* Notice set the agency fee to be deducted from nonunion employee paychecks for the 2005-06 fiscal year at 99.1% of dues. That Notice also informed nonmembers that the reduced agency fee ("fair share fee") of 56.35% of the Union's annual dues, would be charged to nonmembers who objected to paying the full agency fee and who requested a rebate pursuant to the procedures and deadlines outlined in the Notice. The 56.35% was based on the Union's actual expenditures for the year ending December 31, 2004, in which the Union calculated chargeable expenditures to be 56.35% of its total expenditures. *Id.*, No. 28.

On July 30, 2005, the Union proposed an "Emergency Temporary Assessment to Build a Political Fight-Back Fund" ("Assessment") for "use for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California," specifically stating that "[t]he Fund will not be used for regular costs of the union-such as office rent, staff salaries or routine equipment replacement, etc." *Id.*, No. 20.Additionally, the Union claimed that the Assessment was to "be used specifically in the political arenas of California to defend and advance the interests of members of the Union and the important public services they provide."[2] This Assessment was expected to raise $12 million for the Union. *Id.*, No. 23. On August 27, 2005, Union delegates to the CSEA General Council voted to implement the temporary dues increase of one-fourth of one percent of salary to create this "Political Fight Back Fund." *Id.*, No. 22.

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[2] The Court notes Defendants' assertion that the Assessment was actually used "for a broad variety of expenditures, many of which were for chargeable activities." As is discussed, *infra*, this

On August 31, 2005, the Union sent another letter, addressed to "Local 1000 Members and Fair Share Fee Payers." The letter stated that Union members were subject to a dues increase and that "[t]he $45 per month cap on . . . regular dues of 1% of gross pay [would] continue in effect, but [would] not apply to this additional .0025 temporary increase." *Id.*, No. 29. That letter also claimed that the Union would use the funds from the Assessment to "defeat Proposition 76 and Proposition 75 on November 8." Additionally, according to the Union, it intended to "defeat another attack on [its] pension plan" in June of 2006, and "[i]n November 2006, [it would] need to elect a governor and a legislature who support public employees and the services [they] provide." Compl., Exh. D.

[3] After receiving this letter, Plaintiff Dobrowolski called the Union's Sacramento office, and was directed to its Riverside office where he left a message for Jodi Smith, area manager. Smith returned his call and stated that, even if Dobrowolski objected to the payment of the full agency fee, there was nothing he could do about the September increase for the Assessment. She also stated that "we are in the fight

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is not material to the disposition of this Motion. Additionally, the Court is cognizant of Defendants' position that none of their publications at the time the Assessment was adopted actually stated that the Assessment would be used "exclusively" for purposes set forth in those quotations or "exclusively" for non-chargeable expenditures. This, too, is immaterial to the Court's disposition of the current Motion.

of our lives," that the Assessment was needed, and that there was nothing that could be done to stop the Union's expenditure of that Assessment for political purposes. UF, No. 34.

Pursuant to the Assessment, the Controller began deducting additional fees at the end of September, 2005. *Id.*, No. 31.Plaintiffs subsequently initiated this action in November of that year.

STANDARD

The Federal Rules of Civil Procedure provide for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). One of the principal purposes of Rule 56 is to dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Rule 56 also allows a court to grant summary adjudication on part of a claim or defense. *See* Fed.R.Civ.P. 56(a) ("A party claiming relief may move . . . for summary judgment on all or part of the claim."); *see also Allstate Ins. Co. v. Madan*, 889 F.Supp. 374, 378-79 (C.D.Cal.1995); *France Stone Co., Inc. v. Charter Township of Monroe*, 790 F.Supp. 707, 710 (E.D.Mich.1992).

The standard that applies to a motion for summary adjudication is the same as that which applies to a motion for summary judgment. *See* Fed.R.Civ.P. 56(a), 56(c); *Mora v. ChemTronics*, 16 F.Supp.2d. 1192, 1200 (S.D.Cal.1998).

> Under summary judgment practice, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact.

Celotex at 323 (quoting Rule 56(c)).

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 288 89, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968).

In attempting to establish the existence of this factual dispute, the opposing party must tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Fed.R.Civ.P. 56(e). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 251 52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986*); Owens v. Local No. 169, Assoc. of Western Pulp and Paper Workers*, 971 F.2d 347, 355 (9th Cir.1987). Stated another way, "before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Anderson*, 477 U.S. at 251 (quoting *Improvement Co. v. Munson*, 14 Wall. 442, 448, 20 L.Ed. 867 (1872)).

[4] As the Supreme Court explained, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 586-87.

In resolving a summary judgment motion, the evidence of the opposing party is to be believed, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. *Anderson*, 477 U.S. at 255. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Richards v. Nielsen Freight Lines*, 602 F.Supp. 1224, 1244-45 (E.D.Cal.1985), *aff'd*, 810 F.2d 898 (9th Cir.1987).

ANALYSIS

I. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

A. The 2005 *Hudson* Notice Did Not Provide an Adequate Explanation of the Basis of the Assessment

The dispute in this case, while of great import, is over a relatively simple question: Did Defendants' June 2005 *Hudson* Notice provide "an adequate explanation of the basis" supporting the subsequent September 2005 Assessment?

This somewhat narrow issue is drawn against a broader backdrop of First Amendment jurisprudence. There is no question that "[r]equiring nonunion employees to support their collective-bargaining 'representative has an impact upon their First Amendment interests." *Hudson* at 301 (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977)). Nevertheless, it is constitutional for a "public employer to designate a union as the exclusive collective-bargaining representative of its employees, and to require nonunion employees, as a condition of employment, to pay a fair share of the union's costs of negotiating and administering a collective-bargaining agreement . . . . [H]owever, . . . nonunion employees do have a constitutional right to 'prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative.'" *Hudson* at 301 302 (quoting *Abood* at 234). The fees charged to nonunion employees for services related to a union's collective bargaining activities are termed "fair share" fees.

In *Hudson*, the Supreme Court elaborated "that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson* at 310. Notices issued pursuant to this language have come to be known as "*Hudson* Notices." *Wagner v. Prof'l Eng'rs in Cal. Gov't*, 354 F.3d 1036, 1039 (9th Cir.2004).

[5] After receiving a *Hudson* notice, "the nonunion employee has the burden of raising an objection, but . . . the union retains the burden of proof" as to the appropriate proportion of fair share fees. *Hudson* at 306 (citing *Abood* at 239-240 ("Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of [proof]."")). Additionally, the important policies underlying *Hudson* inform the determination of whether a *Hudson* notice is adequate. "Basic considerations of fairness, as well as concern for the First Amendment rights at stake, . . . dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee." *Hudson* at 306. "Leaving the nonunion employees in the dark about the source of the figure for the agency fee-and requiring them to object in order to receive information-does not adequately protect the careful distinctions drawn in [prior case law]." *Hudson* at 306.

Hudson has been interpreted in later cases as setting the minimum constitutional protections that a union must provide nonunion employees. *See Davenport v. Wash. Educ. Ass'n*, —U.S.—, 127 S.Ct. 2372, 2379, 168 L.Ed.2d 71 (2007). Indeed, our Supreme Court has referred to the Hudson requirements as a "constitutional floor." *Id.*

To date, only the Northern District of California has had the opportunity to address the *Hudson* requirements on facts similar to this case. On two separate occasions that court determined that a union's annual *Hudson* notice provided adequate information to supply a basis for a newly imposed, post-objection period, 10% increase in fees and dues.

See Liegmann v. Cal. Teachers Ass'n, 395 F.Supp.2d 922 (N.D.Cal.2005) (addressing the question in the context of an application for a Temporary Restraining Order ("TRO")) (*Liegmann I*);*Liegmann v. Cal. Teachers Ass'n*, 2006 WL 1795123 (N.D.Cal.2006) (addressing the issue in the context of cross-motions for summary judgment) (*Liegmann II*).

In *Liegmann I*, that court was confronted with facts similar to those this Court considers today. That union issued its annual *Hudson* notice and subsequently implemented an approximately 10% increase in dues and fair share fees to be used either wholly or partially for political purposes. *Liegmann I* at 925-927. Under the standard for reviewing TRO applications, that court had to balance the potential hardships to the parties. *Liegmann I* at 925. The court balanced the union's and the nonobjectors' constitutional rights against those of the objectors and determined that the employee plaintiffs had failed to show that the balance tipped in their favor.[3] *Id.* at 926.

When examining the likelihood of success on the merits, the *Liegman I* court stated, "This Court declines to find nonmembers are further entitled to another *Hudson* Notice, in advance, detailing exactly how much of the additional revenue generated by a fee increase will be spent on which purpose. There is nothing in *Hudson* or subsequent authority which requires that Hudson Notices provide such advance detail." *Liegmann I* at 927.That court went on to determine that nothing in the facts indicated that the "increase [was] so extraordinary that it require[d] a departure from the procedure approved in *Hudson*." *Id*. at 927.

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[3] To the extent the Northern District relied on an apparent need to protect the union's constitutional entitlement to non-union employees' fees, that decision cannot stand. *See Davenport v. Washington Education Association*,—U.S.—, 127 S.Ct. 2372, 2379, 168 L.Ed.2d 71 (2007).

[6] In *Liegmann II*, the Northern District revisited the same facts in the more developed posture of cross motions for summary judgment. As in this case, that union argued, and that court agreed, that the standard *Hudson* notice provided adequate information regarding the subsequent dues increase. *Liegmann II* at *3. That court further determined that the assessment was not so extraordinary as to warrant a departure from customary *Hudson* procedures. Notably, that court did not have before it a case raising the "question of whether an assessment for purely political purposes would necessitate a deviation from *Hudson* because the facts of [that] case [did] not raise such a question." *Liegmann II* at *5.

This Court, too, need only engage in a straight forward *Hudson* analysis to determine whether, under traditional principles, the Union's 2005 *Hudson* Notice was adequate to provide a basis for its Assessment.[4]

Critical to the current endeavor, and hotly disputed between the parties, is the characterization of the Assessment. As a threshold issue, this Court will address the parties' disagreement regarding the actual magnitude of the Assessment's impact. Plaintiffs state that the Assessment resulted in a 25-35% increase in fees paid by nonmembers. Defendants, to the contrary, attempt to align their cause with *Liegmann*, where the court addressed a 10% increase in fair share fees, by arguing that current objectors only saw an increase of 14.09%. Defendants reach this conclusion by pointing out that, at least for those who objected to the 2005 *Hudson* Notice, the only portion of the increase they would be required to pay is 56.35% of the 25% increase, which equates to a 14.09% increase in the deduction from the objector's salary.[5] This figure is somewhat misleading, however, because it refers only to the increase in the percentage of salary deducted from objectors' wages and not to the percentage increase in fair share fees paid by nonunion employees.

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[4] Because the Court finds the 2005 *Hudson* Notice legally inadequate under its traditional *Hudson* analysis, it is not necessary to consider whether the current facts, when compared to those in the *Liegmann* cases, present such an extraordinary set of circumstances as to warrant a departure from *Hudson*.

Plaintiffs' characterization of the percentage increase in fair share fees is more on point. Standard dues paid by those objectors earning $4500 per month would be capped at 1% of salary, or $45, per month. The Assessment was not subject to this cap. Therefore, someone earning $4500 would be assessed an additional .25% of his or her salary, or $11.25. Since this person was an objector, he or she would only be required to pay 56.35% of the above union dues. In this case, that equals an additional $6.34, which is approximately a 14% increase when compared to the $45 monthly dues. However, objectors would not have paid $45 in union dues. They would have paid only their pro rata share, 56.35% of $45, which is approximately $25.34. Therefore, the $6.34 increase actually equates to an increase of approximately 25% in fair share fees.[6]

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[5] The percentage of salary deducted from nonobjectors increased by 24.775% (99.1% x 25%).

[6] A nonobjector would see the same increase (99.1% x $45.00 = $44.60; 99.1% x $11.25 = $11.15; $11.15/$44.60 = 25%).

Additionally, because the standard dues are capped at 1% of salary, and the Assessment was not subject to this cap, those objectors who earned in excess of $4500 per month, would see this proportion grow as their salaries increased.[7] Therefore, the fair share fees paid by both objectors and nonobjectors actually increased by a much greater margin than Defendants would like to suggest.

[7] This increase represents a material change in the amount of funds nonunion employees were required to contribute to Union expenditures.

More importantly, however, is a determination of the nature of the Assessment. Plaintiffs ask the Court to view the Assessment as a fund intended solely for political and ideological purposes. Defendants disagree and request this Court view it as an ordinary dues and fees increase. This distinction is relevant because there is no case law directly on point dealing with an assessment intended solely to fund political and ideological goals. However, this Court finds that the semantic arguments are not dispositive and engages in the current discussion only to clarify its opinion. Regardless of how the assessment is cast, the Courts' decision is the same.

Based on the Union's own initial characterization of the Assessment, the fund was intended for political purposes. The Court is cognizant of the fact that, in retrospect, the Union may be able to show that the entire fund was not used for nonchargeable, political or ideological purposes. Based on that, Defendants appear to argue that if any of the Assessment's funds were spent on chargeable activities, the Assessment should be treated as an ordinary dues and fees increase. This argument defies logic.

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[7] As an example, an objector earing earning $6000 per month would pay only his pro rata share of 1% of his monthly salary, capped at $45, again $25.34. However, the cap would not limit the amount allocated to him for the Assessment. Therefore, he would be required to pay his pro rata share of .25% of 1% of his salary, in this case an additional $8.45. This equates to an increase in his fair share fee of approximately 33%. A nonobjector earning the same amount would see the same approximate increase.

First and foremost, the Union specifically couched its proposed assessment as an "Emergency Temporary Assessment to Build a Political Fight-Back Fund" for "use for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California." Additionally, the Union stated that the fund was not to be used "for regular costs of the union-such as office rent, staff salaries or routine equipment replacement, etc." Rather, it was to "be used specifically in the political arenas of California to defend and advance the interests of members of the Union and the important public services they provide." *See* UF, Nos. 20, 23.

When employees were officially notified of the Assessment, the Union stated that it intended to use the funds to "defeat Proposition 76 and Proposition 75," to "defeat another attack on [its] pension plan" in June of 2006, and to "elect a governor and a legislature who [would] support public employees and the services [they] provide" in November of 2006. *Id.*, No. 29; *See* Compl., Exh. D. It is hard to imagine any circumstances in which it could be more clear that an Assessment was passed for political and ideological purposes.

Nevertheless, the Union argues that not all of the funds were used for political purposes, and, even if they were, not all political purposes are nonchargeable. However, the adequacy of *Hudson* notices should not be viewed through a lens skewed by the benefit of hindsight.

The undisputed facts surrounding the implementation of the Assessment evidence that the Union fully intended to use the 12 million additional dollars it anticipated to raise for political purposes. Following the Union's logic, it should be required only to show that some small fraction of this fund was used for chargeable purposes in order to justify subverting its *Hudson* responsibilities.

[8] Defendants call for the Court to be practical. However, they cannot simultaneously avoid that call for practicality themselves. The Union controls the categorization of its own expenses. Following Defendants' reasoning, there could never exist an assessment for purely political purposes because it is quite likely that some small portion of such a fund would, from a practical perspective, always be chargeable. It would follow that all post-notice, post-objection period assessments would be considered dues and fees increases, covered by an already issued *Hudson* notice. Unions would then be permitted to pass any such future assessments as long as those funds built in the most minute chargeable cushion, a cushion that is, from a practical perspective, almost inevitable. Without repercussion, Unions would be free to, even if inadvertently, trample on the First Amendment rights of dissenters.

This strategy must fail. Even if every cent of the assessment was not intended to be used for entirely political purposes, it is clear that the Union's intent was to depart drastically from its typical spending regime and to focus on activities that were political or ideological in nature.

This shift represents a material difference from that contemplated under the standard dues structure to which the 2005 *Hudson* Notice was directed and rendered the *Hudson* notice obsolete as to that Assessment.

Defendants adamantly object to being required to provide a second *Hudson* notice. Since they are required to base such notices on audited figures, they argue that it is impossible to provide an advance notice. However, "advance" notice is exactly what *Hudson* requires. It is an advance notice provided to nonunion employees so that they may make an informed decision as to whether or not they object to the use of their funds for political or ideological purposes. The Supreme Court's recognition that these notices would necessarily depend on prior years' financials does not change the underlying function of the notice itself.

Defendants belabor the Supreme Court's nod to practicality in footnote 18 of the *Hudson* opinion. The Court there stated, "We continue to recognize that there are practical reasons why '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required.'" *Hudson* at 307 n. 18. The Court went on, "Thus, for instance, the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year." *Id*. At no point did the Court state that this procedure was the only constitutionally mandated manner in which to prepare a *Hudson* notice. The Court simply noted that, in the case of an annual notice, it was understandable that the union relied on the prior year's figures.

Notably, however, there is at least some nexus between using the whole of the prior year's expenditures as a benchmark for the whole of anticipated current year's expenditures, which could reasonably be expected to remain at a similar level. In that instance, the nonunion employee is being asked to compare one year's apples to the next year's apples. However, in the current case, the nonunion employees were never given any opportunity to make such an informed decision as to the Assessment. Rather, after implementing the increase, the Union took the position that nonunion employees had already been given an opportunity to make an informed decision as to the Assessment by means of the 2005 *Hudson* Notice. The Union now turns a blind eye to the inconsistency inherent in asking nonunion employees to compare apples, in the form of the prior year's financials, to oranges, in the form of a new Assessment, an Assessment which was not to be utilized for Union operations, but was instead earmarked for discrete political purposes.

[9] Defendants' argument that it must rely on audited financial figures which the Assessment has not yet generated is inapposite. Defendants are correct that the *Hudson* Court stated "adequate disclosure surely would include . . . verification by an independent auditor." *Hudson* at 307 n. 18. However, the Ninth Circuit has held that "while a formal audit is not always required, the union must provide a statement of its chargeable and nonchargeable expenses, together with an independent verification that the expenses were actually incurred. *Harik v. Cal. Teachers Ass'n*, 326 F.3d 1042, 1046 (9th Cir.2003).

"This passage certainly indicates that, although the Union must provide a breakdown between chargeable and nonchargeable expenses, the audit does not verify that the allocation is correct, but that the expenses were indeed spent the way the Union claims." *Cummings v. Connell*, 316 F.3d 886, 892 (9th Cir.2003) (rejecting the claim that an allocation audit was required). "What is required is a real independent verification of the financial data in question to make sure that expenditures are being made the way the union says they are." *Id.* (quoting *Prescott v. County of El Dorado*, 177 F.3d 1102, 1107 (9th Cir.1999), *vacated and remanded on other grounds*, 528 U.S. 1111, 120 S.Ct. 929, 145 L.Ed.2d 807 (2000), *reinstated in relevant part*, 204 F.3d 984 (9th Cir.2000)).

Defendants had audited financials from the prior year from which they were able to construct the requisite 2005 *Hudson* Notice. Those expenditures were not necessarily relevant, however, to allocations within the subsequent Assessment. It was within the Union's purview to determine which additional expenditures were chargeable or nonchargeable. *See Harik* at 1046. It follows that it was up to the Union to determine the relevant major categories of expenses as well. The auditor merely "make[s] sure that expenditures are being made the way the union says they are." *Prescott* at 1107. Therefore, the Union could have looked at the purpose of the Assessment and determined which of its major categories of expenses should be allocated to that fund. Those figures had been audited based on the prior year's information, as is acceptable under *Hudson*. The burden is on the Union to put forth the TYPE of relevant expenditures.

The Court's methodology provides the means by which the Union could have met that burden by issuing a second, verified *Hudson* notice, specific to the Assessment, without estimating exact future revenue expenditures.

Ultimately, the crux of the analysis is "adequate information." The Supreme Court determined that, under the *Hudson* facts, use of prior year's financials was "adequate." *See Hudson* at 307 n. 18. The Union's use of its financials was not adequate here because the categories of expenses included in the 2005 *Hudson* Notice were not relevant to the purposes for which the funds in the Assessment were to be used. The Assessment, even according to the Union's own statements, was always intended to provide a stream of funds whose use departed drastically from standard Union spending.

[10] A contrary decision from the one reached today would allow unions to run roughshod over dissenting nonmembers by imposing a post-objection period, "almost" purely political assessment, holding the funds hostage, and then using those funds, even if temporarily, for impermissible purposes.

An advance reduction by the amount of the fair share percentage in the 2005 *Hudson* Notice does not alter this analysis. As the Supreme Court has emphasized, "[A] remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose." *Hudson* at 305.

"A forced exaction followed by a rebate equal to the amount improperly expended is thus not a permissible response to the nonunion employees' objections." *Hudson* at 305-306.[8]

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[8] Defendants' attempt to dismiss constitutional concerns because everything worked out in favor of the nonmember

Regardless of whether couched in terms of the Constitution or in terms of common sense, the 2005 *Hudson* Notice could not possibly have supplied the requisite information with which nonmembers could make an informed choice of whether or not to object to the Assessment. Accordingly, this Court finds that the 2005 *Hudson* Notice was inadequate to provide a basis for the Union's Assessment.

B. New Notice is the Appropriate Remedy to Address the Harm to Plaintiffs as a Result of the Inadequate 2005 Hudson Notice

"An inadequate notice gives fee payers insufficient information with which to decide whether or not to object to paying portions of the fee that are unrelated to representational activities. A new, conforming notice, with a renewed opportunity for fee payers to object to paying nonchargeable amounts, addresses that harm.

Following a new, conforming notice, fee payers could object, and objectors would be entitled to a refund of the nonchargeable portion of the fee, with interest." *Wagner* at 1041. "[B]ecause the injury that fee payers suffer from an inadequate *Hudson* notice is the lack of an informed opportunity to object, the

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employees after the fact is irrelevant. The question is not whether, in retrospect, nonunion employees actually benefitted by being "undercharged." Rather, the question is whether those employees were provided the constitutionally required minimum information to make a forward-looking decision. They were not. Additionally, Defendants' argument hinges on the fact that the chargeable funds expended overall increased. However, the chargeable expenditures attributed to the Assessment were 27.35% in 2005 and 18.77% in 2006, much lower than those attributed to the standard Union dues and fees. Union's Opp'n to Pls.' Motion for Summary Judgment, 12:13-15.

proper remedy is for the union to issue proper notice and give another *opportunity* for objection." *Id.* at 1042 (emphasis in original). These objectors will be entitled to receive a refund, with interest, of the nonchargeable amount.[9] *See Id.* at 1043.

C. Summary of Resolution of Plaintiffs' Motion

The 2005 *Hudson* Notice, which detailed expenditures regarding all Union activities, not just the limited activities to be covered by the Assessment, could, by no stretch of the imagination, have been applicable to this special fund. A second *Hudson* notice was required in the case of this Assessment, not because the 2005 *Hudson* Notice could not conceivably cover any assessment or dues increase, but because the actual notice in this case was inadequate to provide the requisite information regarding the specific Assessment. *See Hudson* at 307 ("[T]he original information given to the nonunion employees was inadequate.")

[11] Defendants essentially rely on the argument that *Hudson* and its progeny left them a convenient loophole, one which now allows them to subvert the central protections *Hudson* is meant to provide. However, no self-asserted loophole will allow Defendants to avoid the Constitution. The *Hudson* Court articulated the minimum protections required under the First Amendment. This Court will not undermine that interpretation by allowing Defendants to hollowly assert that they adhered to constitutional requirements by issuing a standard *Hudson* notice,

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[9] The *Wagner* court considered it relevant that there was no evidence presented that the union had acted in bad faith. *Id.* at 1042. Since the same is true here, the Court need not engage in any further analysis on this point.

which, in actuality, failed to provide any adequate explanation as to how the subsequent Assessment would be used.

Accordingly, Plaintiffs' Motion for Summary Judgment is granted. The Union shall issue a proper *Hudson* notice as to the Assessment, with a renewed opportunity for nonmembers to object to paying the nonchargeable portion of the fee. The Union is ordered to issue nonmembers who, pursuant to this proper notice, object to the Assessment a refund, with interest, of that amount. *Wagner* at 1043.

II. DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION

A. Nonobjectors Did Not Consent to the Assessment by Failing to Object to 2005 *Hudson* Notice

Defendants argue that nonobjectors have no claim against the Union for the wrongful use of funds exacted from their paychecks under the 2005 *Hudson* Notice since they did not object to that Notice. This is basically the same claim, though differently dressed, that Defendants' raised in their already denied first motion for summary judgment.

This Court need not address Defendants' argument that "silence equals consent" under the Constitution. In order for the nonunion employees' failure to object to have any legal significance, the 2005 *Hudson* Notice must have been valid and sufficient to cover the Assessment. *See Wagner* at 1043 ("Th[e] principle [that plaintiffs burden of objection attaches only on provision of proper notice] makes sense, for it would be unfair to require a nonmember to object when the nonmember has, as a matter of law, not been adequately informed of the facts."). Because this Court holds that the 2005 *Hudson* Notice was not adequate as to the Assessment, nonobjectors could not have legally consented to the relevant subsequent deductions. Defendants' Motion for Summary Adjudication as to the class of nonobjectors is denied.

B. Plaintiffs' Claims Are Limited to the Time Period Encompassed by the Union's 2005 *Hudson* Notice

Defendants also argue that any alleged wrong that occurred due to the lack of an adequate *Hudson* notice was remedied when the Union issued its subsequent *Hudson* notice in June of 2006. *See Wagner* and discussion, *supra*.

Since the proper remedy for the current wrong is a new *Hudson* notice and since Plaintiffs have not challenged the adequacy of the Union's 2006 or 2007 *Hudson* notices, this Court agrees with Defendants that the only time period relevant to the current dispute is September 2005 through June 2006 (inclusive). Hence, Defendants' Motion for Summary Adjudication as to the relevant time period is granted.

CONCLUSION

[12] Plaintiffs' Motion for Summary Judgment is GRANTED. Defendants are ordered to issue, within sixty (60) days following the date of this Order, a proper *Hudson* notice as to the 2005 Assessment, offering nonmembers a forty-five (45) day period in which to object. The Union shall thereafter issue to those nonmembers who object to this new *Hudson* notice a refund of the nonchargeable portion of the Assessment. Pursuant to 28 U.S.C. § 1961, the Union shall further issue to those nonmembers all interest

accruing from the date(s) upon which nonchargeable deductions were taken.

Defendants' Motion for Summary Adjudication as to the nonobjector class is DENIED and Defendants' Motion asking the Court to limit the relevant time period to September 2005 through June 2006 (inclusive) is GRANTED.

The Clerk of the Court is directed to enter judgment in favor of Plaintiffs and close the file.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES CONSTITUTION

First Amendment

The First Amendment provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX D

UNITED STATES CONSTITUTION

Fourteenth Amendment

The Fourteenth Amendment provides in pertinent part:

> Section 1. . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

RALPH C. DILLS ACT, CAL. GOV'T CODE § 3512 *ET SEQ*.

§ 3513. Definitions

As used in this chapter:

> (k) "Fair share fee" means the fee deducted by the state employer from the salary or wages of a state employee in an appropriate unit who does not become a member of and financially support the recognized employee organization. The fair share fee shall be used to defray the costs incurred by the recognized employee organization in fulfilling its duty to represent the employees in their employment relations with the state, and shall not exceed the standard initiation fee, membership dues, and general assessments of the recognized employee organization.

§ 3515. Employee organizational rights; maintenance of membership; fair share fee; self representation

Except as otherwise provided by the Legislature, state employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. State employees also shall have the right to refuse to join or participate in the activities of employee organizations, except that nothing shall preclude the parties from agreeing to a maintenance of membership provision, as defined in subdivision (i) of Section 3513, or a fair share fee provision, as defined in subdivision (k) of Section 3513, pursuant to a memorandum of understanding. In any event, state employees shall have the right to represent themselves individually in their employment relations with the state.

OPPOSITION BRIEF

RECORD
AND
BRIEFS

No. 10-1121

IN THE

Supreme Court of the United States

DIANNE KNOX, *et al.*,
Petitioners,
v.
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Unfortunately for Petitioners Dianne Knox, *et al.* (hereinafter "Petitioners"), neither of the Questions Presented set forth in their Petition is *actually* presented by this case. *See* Pet. at (I). For that reason alone, the Court should deny the Petition.

Petitioners' first Question Presented asks whether a state may, under the First and Fourteenth Amendments, "condition employment on the payment of a special union assessment intended solely for political and ideological expenditures without first providing a *Hudson* notice that includes information about that assessment and provides an opportunity to object to its exaction[.]" Pet. at (I).[1] As we discuss below in Section I(A) of the Argument, that question is not properly presented in this case because the record evidence is unequivocal that (1) the temporary dues and fees increase at issue (to which Petitioners refer as a "special union assessment") was used to fund both *chargeable* and non-chargeable expenditures, and was not "solely for political and ideological expenditures," (2) even if the *intent* in imposing the increase were relevant (as opposed to the expenditures it *actually* funded), there is *no* record evidence that it was "intended solely for political and ideological expenditures," and (3) fee payers who had submitted timely objections in response to the annual *Hudson* notice then in effect were charged only for that portion of the increase corresponding to the "chargeable" percentage set forth in that *Hudson* notice, rather than for the entire amount of the increase. As such, this case is simply not a proper vehicle for consideration of Petitioners' first Question Presented.

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[1] The term "*Hudson* notice" in Petitioners' first Question Presented refers to *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986) (hereinafter "*Hudson*").

Petitioners' second Question Presented asks whether a state may, under the First and Fourteenth Amendments, "condition continued public employment on the payment of union agency fees for purposes of financing political expenditures for ballot measures[.]" As we discuss below in Section II(A) of the Argument, that question is not properly presented in this case. Its resolution could only result in an advisory opinion that would not change the result below.

Petitioners' second Question Presented is intended to challenge the statement in footnote 2 of the decision below that Respondent's expenditures to oppose California Proposition 76, which would have permitted California's Governor to unilaterally abrogate Respondent's collective bargaining agreements, could be considered chargeable. Petitioners neither pleaded nor litigated any claim, however, to challenge Respondent's determination as to the chargeability of that expenditure. The only manner in which the chargeability of that expenditure came into the case was in connection with Petitioners' unfounded assertion, which is the subject of their first Question Presented, that the temporary dues and fees increase was devoted solely to financing non-chargeable activities. However, the undisputed record evidence in this case establishes that the funds raised by the increase were expended not just to oppose Proposition 76, but also on other indisputably chargeable activities such as union meetings, a survey of union members that was partially devoted to collective bargaining issues, and the cost of defending the present lawsuit. Thus, even if the expenditures to oppose Proposition 76 were deemed to be wholly non-chargeable, the existence of other indisputably chargeable expenditures financed from the increase entirely rebuts Petitioners' unfounded assertion that the increase was spent solely on non-chargeable activities, which underpins their entire case.

For that reason, even if this Court were to grant the Petition and hold that the Proposition 76 expenditures were non-chargeable, its decision would be nothing more than an advisory opinion. The existence of other indisputably chargeable expenditures financed from the increase amply supports the judgment below that Respondent did not violate the law by failing to issue a second, mid-year *Hudson* notice regarding the increase, and thus that judgment would have to be affirmed notwithstanding the chargeability *vel non* of the Proposition 76 expenditures.

Finally, as we also show below, the Petition should be denied because it fails to identify an actual conflict or important issue meriting this Court's attention.

STATEMENT OF THE CASE

Respondent hereby incorporates by reference the statement of facts set forth in Section I(B) of the decision below. Additionally, Respondent here addresses the following factual misstatements or mischaracterizations in the Petition.

1. To the extent that Petitioners intend to imply from the enactment of the temporary increase approximately three months after the issuance of the June 2005 *Hudson* notice that Respondent purposely delayed consideration and enactment of the increase until after the objection and challenge period under the *Hudson* notice had expired (*see* Petition at 5 & n.3), there is absolutely no evidence in the record to support such an implication or any other implication that this sequence of events was anything but coincidental.

2. Petitioners' description of the action in the district court is incomplete and misleading in that it seeks to portray that court as having been unequivocal in its condemnation of Respondent's failure to issue a mid-year *Hudson*

notice regarding the increase. Petitioners omit to mention that the district court held in its written Order vacating the restraining order and denying Petitioners' request for a preliminary injunction that Respondent's actions were "unquestionably permitted under the [Supreme Court's] *Hudson* holding." Docket No. 23 at 5:22. The district court's misunderstanding of the applicable jurisprudence is obvious from its inconsistent decisions.

3. Petitioners erroneously state that the court of appeals' opinion "held that the appropriate standard for adjudicating a union's actions in enforcing a forced-unionism agreement is 'the normal *Hudson* balancing and reasonable accommodation test we have used in the past when deciding challenges to *Hudson* notice procedures.'" Petition at 9 (quoting *Knox v. California State Employees Ass'n, Local 1000*, 628 F.3d 1115, 1120 (9th Cir. 2010)). In fact, it held that standard applicable only to resolving Petitioners' challenge to Respondent's compliance with *Hudson*'s procedural requirements, the only challenge Petitioners brought in this case. As we discuss below, Petitioners disputed neither the chargeability determinations contained in Respondent's *Hudson* notices nor, as the court below properly noted, "the Union's actual spending of the fees." *Knox*, 628 F.3d at 1122. As that court correctly concluded, Petitioners "explicitly concede theirs is only a procedural notice challenge . . . ." *Id.* Thus, the court of appeals did not reach the issue (which was not raised in this case) of the legal standard applicable to *other* challenges to a union's actions under a fair share fee agreement, such as its chargeability and spending decisions.

REASONS FOR DENYING THE WRIT

The Petition should be denied because (1) neither of the Questions Presented is properly presented in this case, (2) it presents no important issue that requires the attention of this Court and (3) identifies no square conflict between the circuits or between the court of appeals' decision and a decision of this Court.

Before discussing these reasons in detail, we note briefly what this case was about. Each year in June, in compliance with this Court's decision in *Hudson*, Respondent sends its non-members a fair share fee notice. That notice discloses Respondent's major categories of expenditure from its most recently audited prior year, broken down into chargeable and non-chargeable classifications. The notice encloses a verification by an independent auditor, and informs the non-members of their rights to object to paying for non-chargeable expenditures and to challenge Respondent's calculation of the chargeable amount, as well as the procedures for so doing. Respondent sent its non-members such a *Hudson* notice in June 2005, based on its expenditures during its most recently audited prior year (calendar year 2004), which Plaintiffs have admitted was constitutionally adequate. *See* Docket 99 at 14 n.11; Ninth Circuit Answering Brief at 39 n.23.

A month or so after sending that *Hudson* notice, Respondent's leadership began to discuss, and subsequently enacted, a temporary increase in union dues and hence fair share fees (which are calculated as a percentage of union dues), that went into effect at the end of September 2005. Because the increase was not even contemplated at the time of the issuance of the June 2005 *Hudson* notice, and because, in any event, that notice was based upon Respondent's actual expenses in 2004, the notice did not mention the increase. The June 2005 *Hudson* notice did inform the non-members, however, that dues (and hence fees) were subject to change without further notice to fee payers. Further, the increase altered neither the non-objector rate nor the objector rate (which remained at 99.1% and 56.35% of union dues, respectively), but only the dollar amount of the fee, which increased because the dues rate upon which it is based increased.

The issue that this case raised below is simply stated: having complied with *Hudson* by issuing its June 2005 *Hudson* notice, which Petitioners conceded was constitutionally adequate, was Respondent legally obligated to issue a second notice giving non-members a new opportunity to object in advance of paying for the increase? Petitioners said yes, but the court below disagreed. We discuss that court's decision, and the reasons why it was correct, in greater depth in Section III, below. In short, it began with this Court's decision "in *Hudson* [that] recognized the impossibility of determining the chargeability of a union's anticipated expenditures at the outset of the fee year, and specifically approved calculating the present year's objector fee based on the prior year's total expenditures." *Knox*, 628 F.3d at 1120. The court of appeals then concluded that the logic of that retrospective method of calculating the objector fee on the basis of the union's audited actual prior expenditures compels the conclusion that, having already complied with *Hudson*'s requirements before the beginning of the fee year, Respondent was not legally obligated to issue a second, mid-year notice based upon speculation as to the how the increase might be spent, prior to the implementation of the increase. *Id.* at 1120-23.

I. PETITIONERS' FIRST QUESTION PRESENTED IS NOT PROPERLY PRESENTED AND IS UNCONNECTED WITH THE ARGUMENT THEY PRESENT IN SUPPORT THEREOF, WHICH (IN ANY CASE) DOES NOT PRESENT ANY ISSUE WORTHY OF THIS COURT'S REVIEW

Petitioners' first Question Presented asks whether a state may, under the First and Fourteenth Amendments, "condition employment on the payment of a special union assessment intended solely for political and ideological expenditures without first providing a *Hudson* notice that includes information about that assessment and provides an opportunity to object to its exaction[.]" Pet. at (I). As we discuss below in Section I(A), that question is not properly presented in this case. Moreover, Petitioners' argument in support of that question relates to an entirely different issue, as to which they do not request review: the legal standard applicable to a challenge to a union's compliance with *Hudson*'s procedural requirements, that is, to a so-called "*Hudson* notice challenge." And, as we discuss below in Section I(B), not even that inquiry presents an important issue or a square conflict warranting this Court's attention.

A. Petitioners' First Question Presented Is Not Properly Presented Under the Undisputed Facts of this Case. The question Petitioners seek to litigate under the first Question Presented (or, at least, the only question they actually attempted to litigate below) is whether a union that issues a timely and concededly constitutionally adequate *Hudson* notice prior to the fee year is legally required to issue a *subsequent Hudson* notice during the fee year if it enacts a mid-year temporary dues and fees increase not discussed in the original *Hudson* notice, where that increase is devoted "solely for political and ideological expenditures." Petition at (I).[2] The undisputed record evidence, however, reveals that the factual predicate of that question is absent from this case: the increase here was *not* devoted solely to financing "political and ideological expenditures" (*id.*), much less to financing entirely non-chargeable expenditures.[3] Rather, the increase was devoted to financing a mix of chargeable and non-chargeable expenditures, including such indisputably chargeable activities such as union meetings, a survey of union members partially devoted to collective bargaining issues, and the cost of defending the present lawsuit. Docket No. 65 at 5, ¶ 24; Docket No. 83 at 7, ¶ 24.

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[2] Below, Petitioners drew a distinction between what they characterize as Respondent's "special assessment" (allegedly) devoted exclusively to non-chargeable activities and an "'across-the-board' general increase in fees." Docket No. 99 at 12:11. They contended that the former required the issuance of a mid-year *Hudson* notice, but conceded that the latter would not: "For regular dues and fees, it makes sense to permit the union to 'calculat[e] its fee on the basis of its expenses during the preceding year,' *Hudson*, 475 U.S. at 307 n.18, because the precise usage of those fees throughout the year

As the court of appeals properly found from the undisputed evidence, the increase "itself included no spending limitations, and the money was actually used for a range of activities, both political and not, and both chargeable and not." *Knox*, 623 F.3d at 1119. Indeed, as it also noted, the audit of the Respondent's expenditures revealed that "the chargeable percentage for the 2006 *Hudson* notice, which included the spending from the [increase], was actually *larger* than that from the 2005 notice" which did not include spending from the increase. *Id.*

The only record evidence regarding the actual expenditures of the funds raised from the increase consisted of the independent audits and the testimony of the Respondent's Chief Financial Officer. In their response to the Respondent's Statement of Undisputed Facts on sum-

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is unknown and ever changing." *Id.* at 12:17 – 13:2. By Petitioners' own concession, then, if the temporary dues and fee increase was *not* devoted solely to funding non-chargeable activities, the normal *Hudson* retrospective notice procedure was applicable and no second notice was required.

[3] Non-chargeable expenditures are an even narrower category of expenditures, since this Court's cases clarify that *some* "political" expenditures are indeed chargeable in the public sector. *See, e.g.*, *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520 (1991).

mary judgment, which was based on that evidence, Petitioners failed to dispute the facts regarding the chargeable spending from the funds raised by the increase and the chargeability determinations set forth in Respondent's *Hudson* notices, but instead merely raised meritless hearsay objections. Docket No. 83 at 7:4-11; *see also* Ninth Circuit Opening Brief at 10 n.4 (Respondent's analysis of Petitioners' admissions and hearsay objections); Ninth Circuit Answering Brief at 44-45 n.25 (conceding that the chargeability of the expenditures from the increase is "not relevant to consideration of [Petitioners'] claim for violation of the pre-seizure notice and procedural safeguards mandated by *Hudson* (and therefore, not material to a summary judgment motion in such a case)").

As such, Respondent's evidence of chargeable spending from the increase was entirely unrebutted in the record. For that reason, this case does *not* present the question whether a union must issue a second *Hudson* notice prior to collecting fees under a mid-year fee increase devoted solely to financing non-chargeable expenditures, because the undisputed record in the present case shows that the increase here was not so devoted. Rather, it was devoted to financing a mix of chargeable and non-chargeable expenditures, just as is a union's normal collection of fees.[4]

Since Petitioners' repeated assertion that the increase was devoted solely to financing non-chargeable expenditures is demonstrably false and contrary to the undisputed record evidence, they rely on Respondent's pre-expenditure statements about the uses to which the increase would be put, rather than on the *actual* spending of the increase. *See* Petition at 4-6, 16. That approach is meritless for several independent reasons.

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[4] Further, the only competent evidence in the record shows that Respondent "charged objectors only 56.35% of the temporary increase, the chargeable percentage set forth in the June 2005 notice, rather than 100% of the increase followed by a later rebate." *Knox*, 628 F.3d at 1122; *see* Docket No. 112 at ¶ 4; Docket No. 66 at ¶ 9; *see also* discussion in Ninth Circuit Reply Brief at 8-12.

First, in light of *Hudson*'s retrospective method of basing fee notices on the union's audited expenditures from the most-recently audited prior year, the union's *intended* spending is speculative and thus irrelevant. What matters is how the union *actually* spent its funds, as verified by an independent auditor, since, as Petitioners admitted below, anticipated expenditures cannot be audited. *See* Docket No. 99 at 13 n.10; Docket No. 119 at 8 n.7; Ninth Circuit Answering Brief at 37 n.22.

Second, and in any event, Respondent never stated that the increase would be devoted "solely" or "exclusively" to financing non-chargeable expenditures. Petitioners do not and cannot cite any evidence that Respondent ever committed to spend the increase exclusively on the specific activities listed in Union-issued literature, even though that is how they repeatedly mischaracterize Respondent's statements. Indeed, as the court below noted, "[I]n response to inquiries, the Union specifically stated it intended to split the increase 'between political actions and collective bargaining actions,'" the latter of which are, of course, fully chargeable. *Knox*, 638 F.3d at 1119. The activities identified in the statements regarding the purposes of the increase relied upon by Petitioners were merely illustrative, and not exhaustive, of the activities to which the increase would be dedicated. When the increase was implemented, Respondent could not, and did not attempt to, predict all of the activities the 16-month long, $12 million increase might support. Simply put, the central argument of Petitioners' case comes down to adding to the Respondent's statements a word – "exclusively" – that incontestably is not there.[5]

Finally, even if there were evidence that the increase here had been devoted solely to financing non-chargeable expenditures (which, we reiterate, there is not), Petitioners' first Question Presented would not present a question worthy of this Court's attention because they have admitted that there is no circuit or other conflict as to such an issue and that it is so unique that it has arisen in *no other cases*: "Of course, the [Petitioners'] claim is 'novel' because the circumstances of this case are novel. . . . [N]o case, including ***Hudson***, involved the imposition of a special assessment targeted solely to political and ideological activities shortly after the period for objection to such collection and use of agency fees had expired." Docket No. 116 at 18:7-12 (footnote omitted); *accord* Docket No. 99 at 17:3 – 18:7; Ninth Circuit Answering Brief at 43-45; *see also* Docket No. 116 at 18:3 (Petitioners' brief in opposition to Respondent's motion for partial summary judgment, informing the district court that it "writes on a clean slate" with regard to their challenge) (capitalization altered).[6] Their Petition presents no argument to the contrary and instead attempts to persuade the Court that there is a conflict over different issue: the legal standard applicable to a challenge to a union's compliance with *Hudson*'s procedural requirements (*see* Petition at 13-19), which we discuss next. As such, Petitioners' first Question Presented would not merit this Court's attention, even if it were properly presented here.

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[5] Nor is Respondent's statement that the increase would "'not be used for regular costs of the union – such as office rent, staff salaries or routine equipment replacement'" (***Knox***, 628 F.3d at 1118-19, quoted in Petition at 5 & 9) a statement that the increase would not be used for *any* chargeable activities. Respondent did not in fact use the increase for such normal "overhead" expenses, but it did use a portion of the increase for non-overhead – yet chargeable – expenses including an extraordinary union meeting, a union member survey regarding chargeable issues, and the cost of defending the instant lawsuit, which was not inconsistent with its prior statements.

[6] The admitted novelty of their case rebuts Petitioners' contention that there is a need for this court to resolve "confusion" that exists as to "whether a nonmember subject to a forced-unionism clause is entitled to notice when a labor union significantly increases the amount of fees extracted in order to engage in political and

B. Petitioners' Discussion of the Legal Standard Applicable to a Challenge to a Union's Compliance with *Hudson*'s Procedural Requirements Presents Neither an Important Issue nor a Square Conflict That Warrants the Attention of this Court. As noted above, the Petition's argument nominally in support of the first Question Presented actually bears on an entirely different question: the legal standard applicable to a challenge to a union's compliance with *Hudson*'s procedural requirements (a so-called "*Hudson* notice challenge"). Petition at 13-19. As to that question, Petitioners fail to demonstrate a circuit or other conflict, or an important question, that merits this Court's attention.

First, Petitioners argue that this Court's decisions require the application of strict scrutiny to a *Hudson* notice challenge. Petition at 13-18. In fact, this Court's decisions make clear that strict scrutiny is *not* the appropriate standard. As the court below noted, this Court in *Hudson* "articulated the legal standard to be applied in this analysis as a balancing test, stating that '[t]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to

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ideological activities." Petition at 27. Petitioners cannot point to a *single* case in which that question has ever arisen, as mid-year fee increases devoted solely to financing non-chargeable expenses, like the Loch Ness Monster and Bigfoot, exist more in the imagination than in reality.

require every employee to contribute to the cost of collective-bargaining activities.'" *Knox*, 628 F.3d at 1119-20 (quoting *Hudson*, 475 U.S. at 302).[7]

Petitioners rely on this Court's statement in *Hudson* that the procedural protections required for agency fee collection must "be carefully tailored to minimize the infringement" on fee payers' rights. Petition at 14 & 15-16, 18 (quoting *Hudson*, 475 U.S. at 303). However, they fail to recognize that the very procedure that *Hudson* mandated – a regime of annual fee notices based upon the union's most recently audited prior year of actual expenditures, with fee payers' right to object to paying for non-chargeable expenditures, to challenge the union's calculation of the chargeable percentage, to receive a prompt resolution of such a challenge, and to have the reasonably disputed portion of their fees escrowed pending that resolution (*see Hudson*, 475 U.S. at 304-11) – *did* carefully tailor the procedure to minimize that infringement.

Petitioners' claim in this case has never been that Respondent failed to follow the procedure mandated by *Hudson*. Rather, it has always been that that procedure is not constitutionally sufficient under the facts presented by this case, *i.e.*, that *Hudson* does not apply here and additional procedural protections are required. *See* Docket No. 119 at 2:2-7; *see also* Docket No. 99 at 14:12 – 15:2; Docket No. 116 at 12:17-23. Since it is undisputed that Respondent in fact followed the procedures *Hudson* mandated (and Petitioners have conceded that Respondent's June 2005 *Hudson* notice was constitutionally adequate, *see* Docket 99 at 14 n.11; Ninth Circuit Answering Brief at 39 n.23), the "carefully tailored" language from *Hudson* on which Petitioners rely is of no assistance to them.

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[7] This formulation in *Hudson* quoted above was actually borrowed from this Court's earlier decision in *Abood v. Detroit Board of Education*, 431 U.S. 209, 237 (1977). Thus, the *Hudson* standard is the same as the *Abood* standard.

Petitioners next argue that this Court's decision in *Davenport v. Washington Education Ass'n*, 551 U.S. 177 (2007), mandates strict scrutiny. Petition at 14-15. It does not. *Davenport* concerned the ability of a state legislature to require unions representing state public employees to obtain the affirmative consent of their non-members before charging them for non-chargeable expenditures (as opposed to the "opt-out" system enacted in California and many other states that requires such employees to affirmatively object to paying for non-chargeable expenditures). The Washington Supreme Court had concluded that the legislative "opt-in" scheme violated the unions' constitutional right to collect fair share fees from their non-members. This Court corrected that error by making clear that "unions have no constitutional entitlement to the fees of nonmember-employees." *Davenport*, 551 U.S. at 185. But that does not mean that unions have *no* right of any kind to collect such fees. Respondent in the present case, for example, has a statutory right under California Government Code §3513(k) to do so, as well as a state law contractual right under its collective bargaining agreement. The court below clearly understood this:

> . . . [W]e have consistently recognized that unions have a legitimate interest and "settled" ability to charge agency fees. . . . [citation omitted] We do not intimate this rises to the level of a constitutional "right," but that does not mean the union does not have any rights at all in such a situation. *Hudson*, 475 U.S. at 302, 106 S.Ct. 1066 (affirming union's right to "require nonunion employees, as a condition of employment, to pay fair share fees").

Knox, 628 F.3d at 1120 n.3.

In short, the Washington Supreme Court's error, corrected by this Court, was not that unions and fee payers each have rights that must be accommodated in crafting the procedural requirements for the collection of fair share fees, but rather that state public sector unions have a federal constitutional right to collect such fees that the state legislature cannot alter. As such, *Davenport* says nothing relevant here regarding the applicability of a strict scrutiny standard to *Hudson* notice challenges.

Petitioners' argument does not cite any decisions of this Court applying strict scrutiny to such challenges, but only First Amendment decisions rendered in areas outside of that context. *See* Petition at 15. Nor is Respondent aware of any such decisions. However, there is a decision of this Court that is relevant to that issue, but it does not support Petitioners' position and they neglect to mention it.

In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), this Court invalidated a portion of a federal marketing order that required growers to subsidize generic advertising promoting the types of crops they grew. Applying its fair share fee jurisprudence, the Court invalidated the challenged regulation under the *Abood* standard, which (as we noted above) is the standard that this Court borrowed in *Hudson*. The Court declined to reach the question whether the more stringent "intermediate scrutiny" standard applicable to commercial speech, set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), should apply. *United Foods*, 533 U.S. at 409-10. Since *United Foods* demonstrates that the *Abood/Hudson* standard is less stringent than the intermediate scrutiny standard applicable to commercial speech, it is clearly less stringent than the strict scrutiny standard that Petitioners urge. And it is the less stringent *Abood/Hudson* standard, not strict scrutiny, that applies to *Hudson* notice challenges, as the court below recognized.[8]

Second, failing to show a conflict with any decision of this Court, Petitioners attempt to demonstrate a circuit conflict over the applicability of strict scrutiny to a *Hudson* notice challenge. Petition at 18-19. They are forced to admit, however, that "no circuit has expressly applied strict scrutiny" to such a challenge, and are therefore relegated to relying on language from circuit cases to the effect that the procedural protections accorded to fee payers must be "'narrowly drawn' to comply with the strictures imposed by *Hudson*.'" *Seidemann v. Bowen*, 499 F.3d 119, 124 (2d Cir.

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[8] Sandwiched into their strict scrutiny argument, Petitioners contend that a second, mid-year *Hudson* notice was necessitated by the increase as to "those nonmembers who chose not to object based on the regular [June 2005] *Hudson* notice, but might have objected and paid a reduced fee had they known that the union was increasing the fee to engage in political activities." Petition at 17 (footnote omitted). This argument is rebutted by the undisputed record evidence.

Both the increase and the expenditures therefrom *were* expressly disclosed to the non-members in Respondent's June 2006 *Hudson* notice. Docket No. 105 at 3, ¶ 9; *id.* at 4, ¶ 18; *id.* at 5, ¶ 21; Docket No. 117 at 3:10-12. If the non-objectors did not wish to pay for the non-chargeable expenditures from the increase, one would expect that Respondent would have received more objections in response to its June 2006 *Hudson* notice (in which those expenditures were disclosed) than it did in response to its June 2005 *Hudson* notice (in which they were *not* disclosed because the increase had not yet been enacted, much less implemented). But the undisputed facts are to the contrary: Respondent received 3,351 objections and challenges in response to its June 2005 *Hudson* notice (constituting 11.83 percent of all non-members), but only 3,094 in response to its June 2006 *Hudson* notice (constituting only 10.50 percent of all non-members). Docket No. 105 at 4, ¶ 20; Docket No. 117 at 3:10-12. In other words, Respondent received 257 *fewer* objections to paying for nonchargeable expenditures (including the non-chargeable expenditures from the increase) *after* it disclosed the existence of the increase and the expenditures therefrom than before it did so.

2007) (quoting *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335, 339-40 (2d Cir. 1987), quoted by Petitioners in Petition at 18). However, the mere use of such a formulation does not a circuit conflict make.

By Petitioners' own admission, "The split among the circuits is most clearly highlighted in *Andrews*." Petition at 19. But, far from creating a circuit conflict, the court below expressly *relied* on *Andrews*, from which it quoted the following statement: "When the union's plan satisfies the standards established by *Hudson*, the plan should be upheld even if its opponents can put forth some plausible alternative less restrictive of their right not to be coerced to contribute funds to support political activities that they do not wish to support." *Andrews*, 829 F.2d at 340, *quoted by Knox*, 628 F.3d at 1123. *See also Andrews*, 829 F.2d at 340 ("[W]e do not believe that *Hudson* stands for the proposition that a union's procedures are constitutionally infirm unless they constitute the least restrictive process imaginable"). Clearly, *Andrews* does not endorse a strict scrutiny standard for *Hudson* notice challenges, since a "least restrictive means" test is part and parcel of such a standard. *See, e.g., United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000).[9]

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[9] Petitioners see a conflict between the approach employed below and *Andrews*' statement that "the district court should not have approached this question with a balancing test in which the cost to the union and the practicality of the procedures were to be weighed against the dissenters' First Amendment interests." *Andrews*, 829 F.2d at 339, quoted in Petition at 19. The two situations are not comparable, however, so there is no conflict. By "this question," the *Andrews* court was referring to the fee payers' claim that the union failed to comply with *Hudson*'s requirement that it provide them with an independent audit of its expenditures. *Id.* Thus, *Andrews* rejected a "balancing" approach to determining the lawfulness of a union's failure to comply with an express requirement of *Hudson*. In the present case, on the other hand, Petitioners have made clear that

Rather than identify a true circuit conflict, Petitioners attempt to manufacture one by selectively quoting *dicta* out of context from various circuit cases, none of which actually applied a strict scrutiny standard to a *Hudson* notice challenge. *See* cases cited in Petition at 18-19 & n.6. They have not shown a circuit conflict, but at most argue that a "misapplication of a properly stated rule of law" has occurred, which is insufficient to warrant review by this Court. Supreme Court Rule 10. Indeed, as Petitioners admit, the legal standard applied below to this case "was first applied in *Grunwald v. San Bernardino City Unified School District*, 994 F.2d 1370, 1376 n.7 (9th Cir. 1993)." Petition at 19. They neglect to note, however, that this Court denied a petition for *certiorari* in *Grunwald* that raised the "strict scrutiny" and "carefully tailored" issue. *See Grunwald v. San Bernardino City Unified School District*, 510 U.S. 964 (1993); *Grunwald* Petition for Certiorari, 1993 WL 13075264 at *19-*20 (filed August 17, 1993). For the same reasons the Court declined to review *Grunwald*, it should deny the Petition in the present case.

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they do not argue that Respondent failed to comply with *Hudson*, but rather that Respondent was obligated to provide procedural protections *above and beyond* what *Hudson* requires. *See* Docket No. 119 at 2:2-7; *see also* Docket No. 99 at 14:12 – 15:2; Docket No. 116 at 12:17-23. The court of appeals' approach to that very different question was faithful to *Hudson*'s approach of "devis[ing] a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities" (*Hudson*, 475 U.S. at 302, quoted in *Knox*, 628 F.3d at 1119-20), and was not in conflict with *Andrews*.

II. PETITIONERS' SECOND QUESTION PRESENTED IS NOT PROPERLY PRESENTED BECAUSE IT SEEKS AN ADVISORY OPINION AND PETITIONERS FAIL TO IDENTIFY ANY SQUARE CONFLICT WARRANTING THIS COURT'S REVIEW

A. Petitioners' Second Question Presented Seeks an Advisory Opinion. Petitioners' second Question Presented asks whether a state may, under the First and Fourteenth Amendments, "condition continued public employment on the payment of union agency fees for purposes of financing political expenditures for ballot measures[.]" Petition at (I). By this question, Petitioners seek to obtain review of the second paragraph of footnote 2 of the decision below. But this Court does not review footnotes, even if they contain interesting legal questions. Its jurisdiction does not extend to issuing advisory opinions, that is, opinions on legal questions where the Court's resolution of the question would not alter the result below, regardless of which way the question was answered. *See, e.g., United States v. Evans*, 213 U.S. 297, 299-301 (1909). Here, Petitioners seek such an advisory opinion and, compounding their error, do so with regard to a question that they waived below.

Petitioners' second Question Presented is intended to challenge the statement in the decision below that "not all political expenses are automatically non-chargeable." *Knox*, 628 F.3d at 1119 n.2. But, since Petitioners admit that *some* expenses that are considered "political" – some types of lobbying expenses – *are* chargeable under this Court's jurisprudence (*see* Petition at 20-22), their real challenge goes to the statement in the decision below that Respondent's *Hudson* expenditures to oppose California Proposition 76 could be considered chargeable. As the court of appeals stated, "Proposition 76 would have effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances, undermining the Union's ability to perform its representation duty of negotiating effective collective bargaining agreements." *Knox*, 628 F.3d at 1119 n.2.

The only reason that the question of the chargeability of those expenditures came into the case at all was in connection with Petitioners' unfounded assertion that the increase was devoted solely to financing non-chargeable activities. As we have already discussed above, that assertion was contrary to the undisputed evidence in the record. But even if the court of appeals' statement regarding the chargeability of Respondent's expenditures to oppose Proposition 76 were incorrect, the result would not change.

First, Petitioners' solely "procedural notice challenge" (*Knox*, 628 F.3d at 1122 n.4) did not dispute the accuracy of the chargeability determinations set forth in the Respondent's *Hudson* notices, including those in the June 2006 notice disclosing the expenditures to oppose Proposition 76 and the other expenditures from the increase. *See* Docket No. 83 at 7:4-11; *see also* Ninth Circuit Opening Brief (Respondent's analysis of Petitioners' admissions). Indeed, Petitioners went even farther and expressly and deliberately eschewed any challenge to those chargeability determinations and to the spending of the fees raised by the increase, including those spent to oppose Proposition 76. *See* Ninth Circuit Answering Brief at 44-45 n.25. As the court below correctly found, "[Petitioners] explicitly concede theirs is only a procedural notice challenge, not a challenge to the Union's actual spending of the fees [raised by the temporary increase]. Since, according to [Petitioners], chargeability is immaterial to their challenge, their chief argument (and that of the dissent) premised upon the alleged non-chargeability of the increase (its *purely* political nature) must fail." *Knox*, 628 F.3d at 1122 n.4. Thus, Petitioners have waived the very challenge that they request this Court to resolve – the chargeability *vel non* of Respondent's expenditures to oppose Proposition 76.

Second, even if Petitioners had not waived such a challenge, they failed to dispute the record evidence that the funds raised by the increase were expended not just to oppose Proposition 76, but also on other indisputably chargeable activities such as union meetings, a survey of union members partially devoted to collective bargaining issues, and the cost of defending the present lawsuit. *See* discussion, *supra*, at Section I(A). Even if the expenditures to oppose Proposition 76 were deemed to be wholly non-chargeable, the existence of other indisputably chargeable expenditures financed from the increase entirely rebuts Petitioners' unfounded assertion – which underpins their actual claim in this case – that the increase was spent solely on non-chargeable activities.

Thus, even if this Court were to grant the Petition and hold that the Proposition 76 expenditures were non-chargeable, its decision would be nothing more than an advisory opinion. The existence of other indisputably chargeable expenditures financed from the increase amply supports the judgment below that Respondent was not legally obligated to issue a second, mid-year *Hudson* notice regarding the increase. For that reason, the judgment below would have to be affirmed notwithstanding the chargeability *vel non* of the Proposition 76 expenditures.

B. Petitioners Fail to Identify Any Square Conflict with Regard to Their Second Question Presented. Petitioners assert that the decision below conflicts with the treatment of lobbying expenses in this Court's decision in *Lehnert*, 500 U.S. 507, and in several decisions of the federal circuits and state supreme courts. Petition at 20-27. Examination of Petitioners' authorities, however, reveals that there is no serious conflict worthy of this Court's review.

First, Petitioners assert that the decision below conflicts with *Lehnert*, 500 U.S. 507. Petition at 20-23. The lobbying expenditure that this Court considered in *Lehnert* was "a Preserve Public Education (PPE) program designed to secure funds for public education in Michigan," which "sought to affect the outcome of ballot issues and 'millages' or local taxes for the support of public schools." *Lehnert*, 500 U.S. at 527. The Court held that expense non-chargeable: "Where, as here, the challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective-bargaining agreement, but to financial support of the employee's profession or of public employees generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees." *Id.* at 520.

The expenditure at issue in *Lehnert* was a lobbying effort to raise funds for public schools in the state generally, not tied to any funding for teachers represented by the union. In contrast, the expenditure Petitioners seek to have this Court consider is not "too attenuated," but rather *does* "relate . . . to the . . . implementation of [Petitioners'] collective-bargaining agreement." *Id.* As the court of appeals held, "Proposition 76 would have effectively permitted the Governor to abrogate [Respondent's] collective bargaining agreements under certain circumstances, undermining [Respondent's] ability to perform its representation duty of negotiating effective collective bargaining agreements." *Knox*, 628 F.3d at 1119 n.2. Lobbying to prevent the abrogation of Petitioners' collective bargaining agreements is certainly "relate[d] . . . to the . . . implementation of" those agreements (*Lehnert*, 500 U.S. at 520), since an abrogated agreement will no longer be "implement[ed]." Moreover, giving the Governor the unilateral authority to abrogate those agreements interferes with Respondent's *current* ability to fulfill its statutory obligation of negotiating the *next* agreement. *See Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 853, 859–60 (D.C. Cir. 2006) (regulation allowing employer to unilaterally abrogate collective bargaining agreements fundamentally diminishes a union's bargaining position and nullifies the right to collective bargaining).

There is thus no conflict between the decision below and *Lehnert*. Indeed, the Ninth Circuit *relied* on and cited *Lehnert* in the very portion of its decision that Petitioners assert conflicts with *Lehnert*. *Knox*, 628 F.3d at 1119 n.2. Again, Petitioners have not shown a circuit conflict, but at most argue the existence of a "misapplication of a properly stated rule of law," which is insufficient to warrant review by this Court. Supreme Court Rule 10.

Second, Petitioners assert that the decision below conflicts with several decisions of the federal circuits and state supreme courts. Petition at 23-27. Examination of those decisions, however, reveals no square conflict. *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1422-23 (D.C. Cir. 1997), *see* Petition at 23-24, held non-chargeable the expense incurred by a *private sector* union in lobbying government officials regarding federal regulation of airline safety. *Miller* expressly recognized the difference between private and public sector unions regarding lobbying expenses: "To be sure, in *Lehnert* the Supreme Court recognized an exception to this principle [of lobbying being non-chargeable] *for public sector unions* because '[t]he dual roles of government as employer and policymaker in such cases make the analogy between lobbying and collective bargaining in the public sector a close one.'" *Miller*, 108 F.3d at 1423 (quoting *Lehnert*, 500 U.S. at 519-20) (emphasis added). Since Respondent is a *public sector* union, there is no conflict with *Miller*.

The only other federal circuit decision Petitioners assert conflicts with the decision below is *Reese v. City of Columbus*, 71 F.3d 619, 625-26 (6th Cir. 1995). However, Petitioners admit that *Reese*'s treatment of the chargeability of lobbying activity "is unclear." Petition at 24. As such, it cannot be considered to create a clear conflict with the Ninth Circuit's decision below. Moreover, one of the reasons for the lack of clarity in *Reese* was the issue of the chargeability of extra-unit expenditures, which this Court subsequently clarified in *Locke v. Karass*, 555 U.S. 207 (2009). In sum, Petitioners can show no square conflict with any federal circuit decision.[10]

Finally, Petitioners fare no better in attempting to manufacture a conflict with state supreme court decisions. Both *Albro v. Indianapolis Educ. Ass'n*, 585 N.E.2d 666, 671-72 (Ind. Ct. App.), *adopted sub nom. Fort Wayne Educ. Ass'n v. Aldrich*, 594 N.E.2d 781 (Ind. 1992), and *Browne v. Wisconsin Employment Relations Comm'n*, 169 Wis. 2d 79, 107-08, 485 N.W.2d 376, 387 (Wis. 1992), cited in Petition at 25-26, noted that lobbying activities can be chargeable if they relate to implementation of a collective bargaining agreement. Neither of these decisions conflicts with the decision below because, as we have shown above in our discussion of *Lehnert*, Respondent's expenditures to oppose Proposition 76 *were* "related to" implementation of its bargaining agreements. Finally, *Belhumeur v. Labor Relations Comm'n*,

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[10] Although Petitioners also cite *Seidemann v. Bowen*, 584 F.3d 104, 111-12 (2d Cir. 2009), they admit that *Seidemann* does not conflict with the decision below. *See* Petition at 24.

432 Mass. 458, 735 N.E.2d 860 (2000), cited in Petition at 26-27, is, if anything, even less on point. *Belhumeur* did not concern lobbying expenses at all, but rather "expenses related to implementing a Statewide strike in Massachusetts or reporting or discussing Statewide strikes in other States." *Id.*, 432 Mass. at 470, 735 N.E.2d at 870. Although the *Belhumeur* court noted that the *purpose* of the contemplated strike – "advocating for funding of public education in general" – was identical to the purpose of the lobbying expenditures in *Lehnert* (*id.*, 432 Mass. at 471, 735 N.E.2d at 871), that does not transform the *activities* at issue in *Belhumeur* – strike preparations, discussions and reporting – into lobbying.

As such, Petitioners have failed to demonstrate a conflict between the decision below and any decisions of this Court, the federal circuits or the state supreme courts, with regard to their second Question Presented.

III. THE DECISION BELOW WAS CORRECT

In any event, the case was correctly decided below. The court of appeals correctly found that the increase was devoted to both chargeable and non-chargeable expenses and held that the normal *Hudson* regime of a yearly fee notice based upon the union's *actual* spending during the most recently audited prior year provided all of the procedural protections the non-members were owed. As the court of appeals noted, *Hudson* itself "recognized the impossibility of determining the chargeability of a union's anticipated expenditures at the outset of a fee year, and specifically approved calculating the present year's objector fee based on the prior year's total expenditures." *Knox*, 628 F.3d at 1120. This is because large public sector unions' *Hudson* notices must be based on audited financial statements and "[t]he audit requirement renders impossible any method of determining the chargeability of the upcoming fee year's expenditures other than basing it on the prior year's actual expenditures, because one cannot audit anticipated future expenditures." *Id.* at 1121. The court below properly concluded that the logic of this retrospective system renders the *Hudson* notice an *inherently imprecise* predictor of the upcoming fee year's chargeable and non-chargeable expenditures, with the result that, in some years, fee payers who object to subsidizing non-chargeable expenditures will necessarily end up doing so:

> The inevitable effect of the *Hudson* "prior year" method is a lag of at least one year between the time when a union incurs expenditures and when the audited ratio of its chargeable expenditures to total expenditures is applied to calculate the objectors' fee for the next year. Fluctuation is inherent in such a method: in each year, objectors may be "underpaying" or "overpaying" fees when compared to the chargeable percentage of the union's actual expenditures in that year because under *Hudson*'s "prior year" method the fee is based upon the chargeable percentage of the prior year's actual expenses, but the inevitable effect of the *Hudson* method is that these over- and undercharges even out over time. The *Hudson* notice can never be more than a prediction, which will inevitably be incorrect as to the union's actual expenditures. The *Hudson* notice is not, and cannot be expected to be, more than that.

Id.

The court of appeals properly rejected as "practically unworkable" the argument that a union must issue a mid-year *Hudson* notice "when it 'intends to depart drastically from its typical spending regime and to focus on activities that [are] political or ideological in nature.'" *Id.* at 1122 (quoting district court's decision). This is because "*Hudson*'s prior year method assumes and accepts that a union has no 'typical spending regime.'" *Id.* Rather,

> Union spending may vary substantially from year to year – in one year there may be a new collective bargaining agreement negotiated, resulting in a high chargeable percentage for objectors that is followed by an election year that results in a low chargeable percentage for objectors. . . . [¶] [Under *Hudson*] . . ., even though spending might vary dramatically, a single annual notice based upon the prior year's audited finances is constitutionally sufficient. Otherwise, a union's *Hudson* notice for an upcoming partisan political election year, following a negotiating year, could not be based upon the union's actual total expenditures in the previous year because the union would intend in the coming fee year to "depart drastically from its previous spending regime and to focus on activities that are political or ideological in nature." Yet, this is the system set out by *Hudson*, and no following case has questioned its continuing vitality. The fact that a projection of expenditures may differ from actual expenditures should surprise no one. The key analytic point for *Hudson* purposes is that proper notice is given and subsequent adjustments made.

Id.

Petitioners argue that the result below violates language from *Hudson* – which they pull out of context, thereby changing its meaning – prohibiting unions from "'obtain[ing] an involuntary loan for purposes to which the employee objects.'" Petition at 17 (quoting *Hudson*, 475 U.S. at 305); *see also id.* at 6 ("the Nonmembers found themselves giving Local 1000 a forced loan spent on the ballot propositions and other political and nonbargaining activities to which they objected"); *id.* at 7 (to same effect). Wrenched from its crucial context, however, the "forced loan" language Petitioners borrow from *Hudson* cannot not bear the weight they place upon it.

The danger of an involuntary loan, as that concept has been explained by this Court, arises in two situations. First, an "involuntary" or "forced" loan may occur if a union fails to offer its fee payers the opportunity to object and receive an "advance reduction" in fees at the outset of the fee year, so that they are paying only for expenses germane to collective bargaining as determined on the basis of the prior year's audited expenditures. The forced loan thus arises where the union collects a fee that is equal to full dues and provides a rebate to objectors only at the end of the fee year. *Ellis v. Bhd. of R.R., Airline & S.S. Clerks*, 466 U.S. 435, 443-44 (1984).

Second, a "forced exaction" may occur if a union freely takes and uses the fees of a non-member who has submitted a challenge to the union's calculation of the fee. *Hudson*, 475 U.S. at 305-06. In that situation, *Hudson* requires the union to escrow the disputed portion of the fee pending resolution of the challenge through arbitration. *Id.* at 309-10.

This case presents neither of these concerns. First, no "forced loan" can arise simply from Respondent's use of its actual prior year's expenditures to calculate the chargeable percentage. *Hudson* itself unequivocally endorsed this retrospective procedure for calculating fair share fees based on the ratio of chargeable to non-chargeable spending during the prior year. *Id.* at 307 n.18 ("[T]he Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year").[11]

---

[11] A "forced loan" might arguably have occurred here if Respondent had charged objectors 100% of the increase, rather than the 56.35% objector rate set forth in the June 2005 *Hudson* notice. But, as we have already discussed, it did not; it "charged objectors only 56.35% of the temporary increase, the chargeable percentage set forth in the June 2005 notice, rather than 100% of the increase followed by a later rebate." *Knox*, 628 F.3d at 1122.

Petitioner's theory "proves too much" because it could easily (and inevitably would) result in a "forced loan" occurring under *Hudson*'s own retrospective method. According to Petitioners' theory, a "forced loan" would occur whenever a union's percentage of non-chargeable expenditures is greater than in the prior fee year, for example where a union that devoted 80% of its expenditures to chargeable activities in Fee Year 1, and therefore set the following fee year's objector rate at 80% of union dues, ultimately spent some lesser percentage, say 70%, of its total expenses in Fee Year 2 on chargeable activities. Under Petitioners' theory, the 10% difference that was actually spent on non-chargeable activities would constitute a "forced loan" from the fee objectors, but under *Hudson*'s retrospective method that is not and cannot be the law. *See also Knox*, 628 F.3d at 1121-22 (considering and rejecting Petitioners' argument).[12]

The decision below was correct and Petitioners' arguments to the contrary would invalidate *Hudson*'s retrospective system itself. Thus, Petitioners' disagreement is not with the decision below, but with *Hudson* itself.

---

[12] The second situation contemplated by this Court, a "forced exaction" resulting from a union's failure to escrow the disputed portion of the fee pending arbitral resolution of a challenge to the union's calculation of the chargeable amount (*see Hudson*, 475 U.S. at 309-10), is clearly not implicated in the present case, either. This case has had nothing to do with such challenges, and there has been no claim that Respondent failed to escrow the fees of non-members who submitted timely challenges to its calculation of the chargeable amount in response to the June 2005 *Hudson* notice.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* should be denied.

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May 2011

REPLY
BRIEF

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No. 10-1121

IN THE

Supreme Court of the United States

DIANNE KNOX; WILLIAM L. BLAYLOCK;
ROBERT A. CONOVER; EDWARD L. DOBROWOLSKI, JR.;
KARYN GIL; THOMAS JACOB HASS; PATRICK JOHNSON;
AND JON JUMPER, ON BEHALF OF THEMSELVES
AND THE CLASSES THEY REPRESENT,
Petitioners,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 1000,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

No. 10-1121

DIANNE KNOX; WILLIAM L. BLAYLOCK;
ROBERT A. CONOVER; EDWARD L. DOBROWOLSKI, JR.;
KARYN GIL; THOMAS JACOB HASS; PATRICK JOHNSON;
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Petitioners,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 1000,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

ARGUMENT

Respondent Service Employees International Union, Local 1000's ("Local 1000") Brief in Opposition ("Opp.") echoes a theme inherent in its arguments throughout this case: "Ignore what the union said it would do; adjudicate this case based solely upon what the union claims—after the fact—to have done."

However, compliance with *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 306-10 (1986), is not adjudicated in accord with *post hoc* justifications, as the court below has recognized:

> the purpose of a *Hudson* notice is not so that the federal courts can review the union's accounting after the fact; it is to provide the employee with "sufficient information to gauge the propriety of the union's fee." *Hudson*, 475 U.S. at 306. Thus, we must look at the form and content of the notice from the perspective of the employee at the time the employee receives it.

Knight v. Kenai Peninsula Borough Sch. Dist., 131 F.3d 807, 813 (9th Cir. 1997); *accord Hudson v. Teachers Local No. 1*, 743 F.2d 1187, 1192 (7th Cir. 1984) ("The question here is whether the plaintiffs have a federal right to challenge a procedure that may not have resulted in any improper expenditures. . . . We think they can. . . ."), ***aff'd***, 475 U.S 292 (1986); App. B at 65a ("the adequacy of *Hudson* notices should not be viewed through a lens skewed by the benefit of hindsight").

I. The First Question Presented Is Properly Preserved and Presented.

Local 1000 suggests a disjunction between the first Question Presented and the "argument in support of that question." It claims that the latter "relates to an entirely different issue," *i.e.*, the standard of review the court below applied. Opp. at 1, 7-12. It therefore concludes that "the legal standard applicable to a challenge to a union's compliance with *Hudson*'s procedural requirements" is "not properly presented." Opp. at 7. This conclusion is belied by the considerable portion of the decision below devoted to the standard of review.

The "statement of any question presented is deemed to comprise every subsidiary question fairly included therein." SUP. CT. R. 14(1)(a). Obviously, the standard of review applied by the lower court is a "subsidiary question fairly included therein." *See also* FED. R. APP. P. 28(a)(9)(B) & (b)(5) (briefs require a "concise statement of the applicable standard of review"); *see, e.g.*, 9th Cir. Rule 28-2.5 (same). As those rules make clear, the appropriate standard of review is a predicate to virtually *every* adjudication.

Moreover, Local 1000 attempts to hide what it must concede: that Petitioners' ("the Nonmembers") argument that Local 1000's "*intent* in imposing the" special union assessment, as both the district court and dissenting Circuit Judge Wallace agreed, must govern its duties under *Hudson*. Opp. at 1.[1]

---

[1] Local 1000 discusses at length how its *post hoc* determination that it had not spent the special assessment as it had announced justifies its failure to provide a new *Hudson* notice and opportunity to object. Opp. at 8-12. That begs the question of the appropriate *advance* notice, which must be adjudicated with reference to what is known at the time (*i.e.*, "in advance"), not with the benefit of hindsight. Local 1000 quibbles with the Nonmembers' phrasing, asserting that "Respondent *never* stated that the increase would be devoted 'solely' or 'exclusively' to financing non-chargeable activities." The Nonmembers concede this point: Local 1000 did not use those *specific* words; however, it announced that it would be used for "a broad range of political expenses," R. 1 at 15, and disclaimed that it would "be used for regular [union] costs." R. 1, Exhibit A.

However, Local 1000 overplays its hand—and the court below presumed too much—when it asserts that "in response to inquiries, the Union specifically stated it intended to split the increase 'between political actions and collective bargaining actions.'" Opp. at 10, *citing* App. A at 6a; 628 F.3d at 1119. The document cited makes *no* representations about how the special assessment will be spent, but only about how Local

This is particularly true where, as here, the stated purpose for imposing the assessment is for political expenditures, rather than in accord with previous union spending patterns.[2] Local 1000 may claim that it was lying to itself when it passed the "Emergency Temporary Assessment to Build a Political Fight-Back Fund," but it cannot credibly misrepresent the record claiming that no evidence supports the conclusion that the assessment was intended solely for non-chargeable political and ideological purposes. That "record evidence" is Local 1000's own representations. Local 1000's contrary assertion, Opp. at 1, is false.[3]

1000's "campaign" is to be split "between political actions and collective bargaining actions." R. 6.

[2] The purpose of the "Emergency Temporary Assessment [was] to Build a Political Fight-Back Fund" for "use[] for a broad range of *political* expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California," and further, that "[t]he Fund will *not* be used for regular costs of the union." R. 1, ¶ 23 & Exhibit A (emphasis added); R. 28, ¶ 23 (admitting authenticity of document). This representation constituted a portion of the factual basis for the district court's decision and judgment. Petition ("Pet."), App. B at 53a-54a & n.2; *id.* at 63a-64a.

[3] Local 1000 also suggests nonexistent concessions by the Nonmembers arising out of their "distinction between [Local 1000]'s 'special assessment' (allegedly) devoted exclusively to non-chargeable activities and an 'across-the-board' general increase in fees." Opp. at 7 n.2. That distinction is one well-founded in the law. *NLRB v. Food Fair Stores, Inc.*, 307 F.2d 3, 14-16 (3d Cir. 1962) (an assessment differs from normal dues and fees, which are used for normal operating purposes, and is for a specific purpose(s) and of limited duration).

When Local 1000 addresses the legal argument, Opp. at 12, it asserts that there is no genuine conflict on the first Question Presented.

Local 1000 says little about this Court's general First Amendment, forced-speech jurisprudence with which the decision below conflicts, Pet. at 14-15, implying that there is some amorphous "union exception" to these generally-applicable legal principles. Opp. at 15.[4] Instead, Local 1000 merely defends the decision below as an application of *Hudson* to the facts of this case. Opp. at 13-14.

Local 1000's discussion of this Court's decisions profoundly disregards this Court's jurisprudence concerning forced union dues. Thus, while conceding that *Davenport v. Washington Education Ass'n*, 551 U.S. 177, 185 (2007), holds that "unions have no constitutional entitlement to the fees of nonmember-employees," Opp. at 14, *citing* 551 U.S. at 185, Local 1000 immediately asserts "that does not mean that unions have *no* **right** of any kind to collect such fees." Opp. at 14 (bold emphasis added).

Actually, it does, for what this Court said in full was that "[t]hose cases were not balancing *constitutional rights* in the manner respondent suggests, for the simple reason that unions have *no constitutional entitlement* to the fees of nonmember-employees." *Davenport*, 551 U.S. at 185 (emphasis added). Were

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[4] Local 1000 misrepresents the nature of the Nonmembers' claim, asserting that their "claim in this case has never been that Respondent failed to follow the procedure mandated by *Hudson*." Opp. at 13; *but see* R. 1, ¶¶ 40, 45. The Nonmembers' claim is *precisely* that Local 1000 "failed to follow the procedures mandated by *Hudson*" in imposing its Emergency Temporary Assessment, and that it must be considered separately from its ordinary union dues.

Local 1000's union-"rights" rhetoric valid, this Court hardly would have observed in *Davenport* that "it is uncontested that it would be constitutional for Washington to *eliminate agency fees entirely*." *Id.* at 184 (emphasis added), citing *Lincoln Federal Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949). Plainly, collection of forced union dues is merely a statutory privilege, not a "right."

While Local 1000 criticizes the Nonmembers' reliance upon general First-Amendment jurisprudence as "decisions rendered in areas outside of [this] context," it relies itself upon a decision rendered by this Court in another context, *i.e.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 409-10 (2001). It contends that *United Foods* holds that forced union dues jurisprudence applies a lesser standard than commercial speech jurisprudence. Opp. at 15

This contention has *no* merit. In fact, this Court conspicuously declined to "enter into the controversy" over whether "commercial speech [i]s entitled to lesser protection." Instead, it held that "even viewing commercial speech as entitled to lesser protection," 533 U.S. at 410, "the compelled funding for advertising must pass First Amendment scrutiny." *Id.* at 411.

Local 1000 also vehemently disclaims that there is a split among the circuits. Nevertheless, whereas other Circuits have required that procedures be "narrowly drawn," Pet. at 18-19, the Ninth Circuit here self-consciously applied a "balancing and reasonable accommodation test," App. A at 9a; 628 F.3d at 1120, thereby creating a genuine, substantial conflict.[5]

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[5] Denial of the petition in *Grunwald v. San Bernardino City Unified School District*, 994 F.2d 1370 (9th Cir. 1993), *cert.*

II. The Second Question Presented Is Properly Presented, and Does Not Seek an Advisory Opinion.

Opposing the first Question Presented, Local 1000 defends its failure to provide a *Hudson* notice regarding its imposition of a special assessment with a *post hoc* argument that the funds derived from it were "used to fund both *chargeable* and non-chargeable expenditures." Opp. at 1. However, Local 1000 then argues that the Petition should be denied on the second Question Presented because it "seeks an advisory opinion" regarding Local 1000's treatment of some of its expenditures as chargeable to the Nonmembers. Opp. at 19.

Local 1000 cannot have it both ways. If its *post hoc* determination that a portion of the special assessment was expended on chargeable activities sustains a finding that it complied with *Hudson*'s requirements, then its treatment of a portion of those expenditures as chargeable is plainly a "case or controversy," U.S. Const. art. III, reviewable by this Court. As dissenting Circuit Judge Wallace said with regard to the majority's ruling on this issue, "it is peculiar that the majority even makes the assertion that the Union's political expenses would be chargeable if, as the majority avers, 'chargeability is immaterial' to

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denied, 510 U.S. 964 (1993), *cited in* Opp. at 18, is meaningless to this determination. "[S]uch a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated." *Singleton v. C.I.R.*, 439 U.S. 940, 943-44 (1979) (Stevens, J., opinion respecting the denial of the petition for writ of certiorari), *quoting Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-19 (1950) (Frankfurter, J., opinion respecting the denial of the petition for writ of certiorari).

the instant case." App. A at 44a n.4 (*quoting* App. A at 13a n.4). Certainly, Circuit Judge Wallace did not find the majority's footnote on this issue merely "advisory," or "dicta." Rather, he took pains to rebut it in a lengthy footnote. App. A at 43a-44a n.4.

Moreover, this Court's decision in *Locke v. Karass*, 555 U.S. 207 (2009), implicitly rejects the argument, Opp. at 20-21, that a challenge to a union's notice and procedures under *Hudson* cannot challenge the standards for chargeability stated in the notice. *Locke* was plainly the former, and challenged the standards for chargeability stated in the notice. *See Locke v. Karass*, 498 F.3d 49, 52 (1st Cir. 2007), *aff'd*, 555 U.S. 207 (2009) ("MSEA included in its calculation of chargeable expenditures those costs of litigation . . . . that was not undertaken specifically for their own bargaining unit, but rather was conducted by or on behalf of other units or the national affiliate, sometimes in other states"); *id.* at 65-66 (noting that challenge to chargeability of extra-unit litigation was raised as to the notice).

Moreover, Local 1000 still misrepresents the record here.[6] Plaintiffs' Complaint plainly states a free-speech claim for the union's "use[ ] and spen[ding] on ballot propositions and other political and nonbargaining activities." R. 1, ¶ 48 ("Second Claim for Relief"). The Complaint also sought an injunction against that use of the assessment. *Id.* at 12-13 (prayers for temporary and permanent injunctive relief).

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[6] The court of appeals presumed too much when it concluded that "chargeability is immaterial to their challenge," and constituted a concession that "theirs is only a procedural notice challenge." App. A at 13a n.4; 628 F.3d at 1122 n.4. As noted *supra*, the Nonmembers challenged the utter *lack* of notice regarding the special assessment; they could hardly challenge Local 1000's standards for chargeability when they had received no notice regarding the assessment.

Local 1000 relies upon its accountant's determination that some of its special assessment was expended for chargeable activities. The court of appeals specifically ruled that expenditures from these funds for a ballot proposition were properly chargeable to the Nonmembers. App. A at 6a-7a n.2; 628 F.3d at 1119 n.2. The Nonmembers cannot be seeking an advisory opinion when a reversal by this Court upon the Petition would require refunds of illegally-seized fees to thousands of nonmembers on remand. *But see* Opp. at 21. As the court below's error is substantively remediable, this issue is properly reviewable by this Court.

Local 1000's argument that the Nonmembers present no "square conflict" on the second Question Presented, Opp. at 12, implicitly concedes that there are conflicts among the lower courts, but has no more merit than its "advisory opinion" argument. Opp. at 21-25.

Local 1000 first suggests that there is "no serious conflict" with this Court's decision in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). Opp. at 22. The *Lehnert* Court was quite specific in limiting its exception to the general rule that nonmembers cannot be forced to subsidize union political and ideological activities. *See* Pet. at 22. There, as here, the union charged nonmembers for lobbying and political activities concerning laws of general application, not directly for "the ratification or implementation of [their] collective-bargaining agreement." 500 U.S. at 520. The holding of the court below clearly conflicts with this limitation. Nevertheless, Local 1000 attempts to re-write *Lehnert*. Opp. at 22-23.

While conceding the Sixth Circuit's confusion in *Reese v. City of Columbus*, 71 F.3d 619, 625 (6th Cir. 1995), Local 1000 dismisses as somehow not "square" the conflict of the decision below with other lower courts. Opp. at 24. Even if true, the differences between the decision below and the decision of the District of Columbia Circuit in *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1422-23 (D.C. Cir. 1997), are insufficient to be dismissed as "no square conflict." Opp. at 23-24. That *Miller* was rendered concerning a private-sector union is of no import, for it squarely applied *Lehnert*'s principles to reach a conclusion contrary to that of the court below. Likewise, the conflict between the court below and other state courts, Pet. at 25-27, lies in the latters' narrow *application* of *Lehnert*'s principle limiting chargeable lobbying activities, as opposed to the Ninth Circuit's expansive reading here.

III. Like the Court Below, Local 1000 Seriously Misapprehends *Hudson*'s Requirements and the Interests This Court's Decision Protects.

Local 1000 briefly discusses *Hudson*'s determination of the protections necessary when agency fees are calculated as a portion of ordinary union dues. Opp. at 25-29.

Like the Ninth Circuit, this treatment begs the questions raised by this case, which addresses a special assessment imposed for a specific purpose; "for a broad range of political expenses," and specifically "not . . . for regular costs of the union." App. B at 53a. Like the Ninth Circuit's decision, Local

1000's argument is notable for its failure to consider "the careful distinctions drawn in *Abood*." *Hudson*, 475 U.S. at 306, *citing Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

Abood and *Hudson* both require that notice gives employees "a fair opportunity to identify the impact of the governmental action on [their] interests and to assert a meritorious First Amendment claim," as well as prevent the union from "'obtain[ing] an involuntary loan for purposes to which the employee objects.'" *Hudson*, 475 U.S. at 303, 305, *quoting Ellis v. Railway Clerks*, 466 U.S. 435, 444 (1984). The Nonmembers discussed these principles in their Petition, particularly the "acute" need for notice to previously non-objecting Nonmembers. Pet. at 17.

Local 1000 defends the decision below with entirely *post hoc* reasoning, asking this Court to ignore the assessment's intended purpose. The district court's judgment applies *Hudson*'s principles, while the court of appeals shoehorns the inapposite facts of this case into *Hudson*'s facts.

CONCLUSION

The court below focused narrowly upon the application of *Hudson*'s principles to its specific facts and failed to give due regard to the core mandate of both *Hudson* and *Abood*: to require a "procedure . . . carefully tailored to minimize the infringement" on First Amendment rights, and to provide a notice which gives "the nonunion employee . . . a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim." *Hudson*, 475 U.S. at 303. Thus, as found by the district court, when Local 1000 "depart[ed] drastically from its typical spending regime and to focus on activities that were political or ideological in nature . . . . represent[ing] a material difference from that contemplated under the standard dues structure to which the [normal, annual] *Hudson* notice was directed," Local 1000 "rendered the *Hudson* notice obsolete as to that Assessment." App. B. at 65a-66a. It thus triggered an obligation to provide a new notice and opportunity to object.

Therefore, for the reasons stated in the Petition and above, the Petition for Writ of *Certiorari* should be granted, and the case set for plenary briefing and argument on the important questions presented.

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May 24, 2011

JOINT
APPENDIX

RECORD
AND
BRIEFS

No. 10-1121

IN THE

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DIANNE KNOX ET AL.,
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SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 1000,
Respondent.

**On Writ of *Certiorari* to the
United States Court of Appeals
for the Ninth Circuit**

JOINT APPENDIX

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix in the printed Petition for *Certiorari*:

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Court of Appeals Docket #: 08-16645

DIANNE KNOX; WILLIAM L. BLAYLOCK; ROBERT A.
CONOVER; EDWARD L. DOBROWOLSKI, JR.; KARYN GIL;
THOMAS JACOB HASS; PATRICK JOHNSON; AND
JON JUMPER, on Behalf of Themselves and
the Class They Represent,
Plaintiffs,

v.

STEVE WESTLY, Controller, State of California;
and CALIFORNIA STATE EMPLOYEES ASSOCIATION,
LOCAL 1000, SERVICE EMPLOYEES INTERNATIONAL
UNION, AFL-CIO-CLC,
Defendants.

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET TEXT
10/9/09	23	Case Argued
12/10/10	24	Opinion — Published — Reversed
1/3/11	26	Judgment Entered and Mandate Issued

U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil No.: 2:05-cv-2198-MCE-KJM

DIANNE KNOX; WILLIAM L. BLAYLOCK; ROBERT A. CONOVER; EDWARD L. DOBROWOLSKI, JR.; KARYN GIL; THOMAS JACOB HASS; PATRICK JOHNSON; JON JUMPER; AND R. PAUL RICKER, on Behalf of Themselves and the Class They Represent,

Plaintiffs,

v.

STEVE WESTLY, Controller, State of California; and CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO-CLC,

Defendants.

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET TEXT
11/1/05	1	Complaint
3/31/06	45	Plaintiffs' Renewed Motion for Class Certification
11/1/06	81	Order Granting Motion for Class Certification
7/13/07	98	Plaintiffs' Motion for Summary Judgment and/or Summary Adjudication

DATE	#	DOCKET TEXT
7/17/07	103	Defendant Service Employees International Union, Local 1000's Motion for Summary Judgment
3/28/08	140	Judgment
7/14/08	155	Notice of Appeal
8/26/08	161	Amended Notice of Appeal

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UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

Case No. 2:05 cv-2198 MCE KJM
Class Action

DIANNE KNOX; WILLIAM L. BLAYLOCK; ROBERT A. CONOVER; EDWARD L. DOBROWOLSKI, JR.; KARYN GIL; THOMAS JACOB HASS; PATRICK JOHNSON; JON JUMPER; AND R. PAUL RICKER, On Behalf Of Themselves and The Class They Seek To Represent,
Plaintiffs,

v.

STEVE WESTLY, Controller, State of California;
and CALIFORNIA STATE EMPLOYEES ASSOCIATION,
LOCAL 1000, SERVICE EMPLOYEES INTERNATIONAL
UNION, AFL-CIO-CLC,
Defendants.

PLAINTIFFS' VERIFIED CLASS ACTION COMPLAINT

COMPLAINT

1. This is a civil rights, class action seeking immediate injunctive and declaratory relief, and nominal and compensatory damages and/or restitution, to redress and prevent the deprivation, through action by Defendants acting under color of state law, of Plaintiff public employees' rights, privileges and immunities under the First and Fourteenth Amendments to the United States [2]Constitution.

2. Specifically, this civil rights action seeks to prevent CSEA from increasing the amount of money taken from the wages of public employees as dues or compulsory fees and using the temporary assessment as an involuntary loan to defeat various California political propositions on the **8 November 2005** ballot, and to take other political or ideological actions which are contrary to the beliefs and positions of the public employees. These deductions have been and will continue to be conducted in a manner which violates Plaintiffs' First and Fourteenth Amendment rights as set forth in the United States Supreme Court's decisions establishing the procedures and safeguards, and limiting the circumstances, under

which the temporary assessment in dues and fees may constitutionally be collected from public employees. These safeguards include notice to all potential objectors of the purpose(s) for which the temporary assessment is to be used and spent, and an appropriately justified advance reduction or advance rebate in the amount of the temporary assessment used wholly for ballot propositions, political activities and other nonbargaining activities.

3. Once the employees' money is spent contrary to their wishes to affect: (1) the outcome of the ballot propositions; (2) the Governor's programs; and (3) political or ideological matters, and for other nonbargaining activities, the employees' First Amendment rights are irretrievably lost. Accordingly, immediate injunctive relief is necessary to maintain the *status quo* and prevent the irreparable injury and loss of the First Amendment rights of the employees and the class or classes they seek to represent.

JURISDICTION AND VENUE

4. This action arises under the Constitution and laws of the United States, particularly the First, Fifth, and Fourteenth Amendments to the United States Constitution. The jurisdiction of this Court, therefore, is invoked under 28 U.S.C. § 1331.

5. This is also an action under the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983, to redress the deprivation, under color of state law, of rights, privileges and immunities secured to Plaintiffs and class members by the Constitution of the United States, particularly the First, Fifth, and Fourteenth Amendments thereto. The jurisdiction of this Court, therefore, is invoked under 28 U.S.C. [3]§ 1343(a)(3) & (4), pursuant to which this Court may grant: a) damages

or restitution for the violation of Plaintiffs' First and Fourteenth Amendment rights in the amount of the temporary assessment unconstitutionally collected and used, plus interest; b) injunctive relief against the future collection or spending of the temporary assessment; c) nominal damages for the violation of Plaintiffs' federally protected rights; and d) reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988.

6. This is also a case of actual controversy where Plaintiffs are seeking a declaration of their rights under the Constitution of the United States. Under 28 U.S.C. §§ 2201 and 2202, this Court may declare the rights of Plaintiffs and grant further necessary and proper relief based thereon, including preliminary and permanent injunctive relief, pursuant to Rule 65, FED.R.CIV.P.

7. **Venue:** Pursuant to 28 U.S.C. § 1391(b) and § 1392, venue is proper in this Court because Defendants either reside and/or have offices and conduct their business in the judicial district of the United States District Court for the Eastern District of California.

PARTIES

8. Plaintiffs Dianne Knox, William L. Blaylock, Robert A. Conover, Edward L. Dobrowolski, Jr., Karyn Gil, Thomas Jacob Hass, Patrick Johnson, Jon Jumper, and R. Paul Ricker are, and were at all times mentioned herein, individuals employed by various instrumentalities of the State of California. As such, they are "state employees" within the meaning of the Ralph C. Dills Act, CAL. GOVT. CODE, § 3513(c). Plaintiffs are employed in a bargaining unit designated as "Bargaining Unit 1," which is one bargaining unit of State employees among several

represented, exclusively for purposes of collective bargaining with their employer, by Defendant California State Employees Association, Local 1000, Service Employees International Union, AFL-CIO, CLC (hereinafter "CSEA" or "the union").

a. Plaintiffs Knox, Blaylock, Dobrowolski, Gil, Hass, Johnson, and Jumper, are not members of CSEA and have not, at any time material hereto, been members of CSEA and/or its affiliates, and nevertheless have been and are subject to the automatic seizure of agency fees, including the temporary assessment;

b. Until on or after 1 October 2005, Plaintiff Conover was a member of CSEA [4]and/or its affiliates, and full union dues were deducted monthly from his wages; and

c. Plaintiff Ricker is, and has been at all times material hereto, a member of CSEA and/or its affiliates, and full union dues have been and continue to be deducted monthly from his wages.

9. Defendant Steven Westly (hereinafter "Westly") is the Controller of the State of California. As such, he is charged with the responsibility of issuing wages to employees of the State and/or its Departments, including Plaintiffs, and processing all deductions therefore, including for union dues and so-called "fair share" fees pursuant to "agency shop" agreements. He is sued in his official capacity.

10. Defendant California State Employees Association, Local 1000, Service Employees International Union, AFL-CIO, CLC ("CSEA" or "the union") is an "employee organization" as defined in the Ralph C. Dills Act, CAL. GOVT. CODE, § 3513(a), and has been recognized as the exclusive representative under said

law for collective bargaining purposes of all State employees in Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20, and 21. On information and belief, Defendant CSEA is a nonprofit corporation formed and existing under the laws of the State of California. CSEA is headquartered in the Eastern District of California, and conducts its business and operations throughout the State of California, and also within the Eastern District of California.

CLASS-ACTION ALLEGATIONS

11. Plaintiffs' action is a class action brought by Plaintiffs on their own behalf and on behalf of others similarly situated, pursuant to Rule 23(b)(1)(A) and (b)(2) and, alternatively, Rule 23(b)(3), FED.R.CIV.P. The class that Plaintiffs seek to represent consists of all former, current, and future State of California employees employed in Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20, and 21 who are, have been, or will be represented exclusively for purposes of collective bargaining by CSEA, in three subclasses:

a. All individuals who pay compulsory fees to CSEA who are not members and who have, at one time or another, specifically objected to the use of their union fees for politics or other nonbargaining activities;

[5]b. All individuals who pay compulsory fees to CSEA who are not members and who have never specifically objected to the use of their union fees for politics or other nonbargaining activities; and

c. All individuals who pay dues to CSEA as members.

12. The number of persons in this class exceeds one hundred thousand. Upon information and belief, the number of persons in each subclass is believed to number in the thousands, and may be in the tens of thousands. These persons are therefore so numerous that joinder of all members of the class and each subclass obviously is impractical.

13. There are questions of law and fact common to all members of the class, to-wit, whether Defendants may constitutionally and lawfully seize the temporary assessment from the wages of the state employees which are to be used wholly for ballot propositions, political activities and other nonbargaining activities without providing all of the procedural safeguards required by the First and Fourteenth Amendments to the United States Constitution to be given all potential objectors.

14. Plaintiffs' claims are typical of other members of the class and each subclass, who are subject to the same deprivations of their rights by CSEA's collection and spending of the temporary assessment, without providing the necessary constitutional safeguards and rights, as hereinafter alleged.

15. Plaintiffs can adequately represent the interests of other members of the class and each subclass. Plaintiffs have no interests antagonistic to other members of the class and subclasses related to the subject matter of this lawsuit, since all members of the class and each subclass are "potential objectors" as that term was used by the United States Supreme Court in *Hudson*, 475 U.S. at 306, and are entitled to notice and the procedures and safeguards required by the Constitution.

16. Plaintiffs' attorneys are experienced in representing litigants before this Court. Plaintiffs' counsel is provided *pro bono publico* by a national charitable legal aid organization, and their lead counsel is experienced in representing nonunion employees in litigation, including class actions, involving issues identical or similar to those raised in this action, and in fact, has litigated the most recent leading cases addressing these issues in this Circuit. Plaintiffs' attorneys are well qualified to be appointed class counsel by the Court.

[6]17. Because the unions' duty not to invade the First Amendment rights of the public employees applies equally to all in the class and each subclass, the prosecution of separate actions by individual class member public employees would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for Defendants.

18. Defendants have acted and threaten to continue to act on grounds generally applicable to all members of the class and each subclass, thereby making appropriate final declaratory, injunctive and other relief with regard to the class, and each subclass as a whole.

19. The questions of law and fact common to the members of the class and each subclass predominate over questions affecting only individual employees, in that the important and controlling questions of law and fact are common to all State employees in the class and subclasses, *i.e.*, whether Defendants have complied with the constitutional requirements for collecting from the employees the temporary assessment earmarked wholly for ballot propositions, political activities and other nonbargaining activities.

20. A class action is superior to other available methods for the fair and efficient adjudication of the controversy, inasmuch as the individual class member employees are deprived of the same rights by Defendants' actions and threatened actions. The limited amount of money involved in the case of each employee's claim would make it burdensome for the class, or each subclass, of employees to maintain separate actions.

Facts

21. Acting in concert under color of state law — to-wit, the Ralph C. Dills Act, Cal. Govt. Code § 3512, *et seq*. — the State of California has recognized Defendant CSEA as the exclusive bargaining agent for the Plaintiffs and other State employees in bargaining units designated as Bargaining Units 1 (Professional, Administrative, Financial, and Staff Services bargaining unit), 3 (Education and Library bargaining unit), 4 (Office and Allied workers bargaining unit), 11 (Engineering and Scientific Technician bargaining unit), 14 (Printing Trades bargaining unit), 15 (Allied Services bargaining unit), 17 (Registered Nurses bargaining unit), 20 (Medical and Social Services Specialists bargaining unit), and 21 (Education, Library, and Maritime bargaining unit). [7]CSEA and the State of California have entered into a series of Memoranda of Understanding ("MOUs") controlling the terms and conditions of employment for Plaintiffs and the class and subclasses of State employees Plaintiffs seek to represent.

22. Pursuant to the Ralph C. Dills Act, Cal. Govt. Code § 3512, the State and CSEA have entered into MOUs governing these bargaining units, including a provision requiring that all State employees in Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20, and 21 join

CSEA as formal union members, or have deducted from their wages agency fees, as a condition of continued public employment.

23. On or about 30 July 2005, the Local 1000 (CSEA) Council proposed an "Emergency Temporary Assessment to Build a Political Fight-Back Fund" for "use[]d for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California," specifically stating that "The Fund will not be used for regular costs of the union—such as office rent, staff salaries or routine equipment replacement, etc." A true and correct copy of the motion to pass this temporary assessment, taken from CSEA's website (http://www.seiu1000.org/august_fight_back_fund.cfm) is attached hereto and incorporated herein as Exhibit A.

24. On or about 27 August 2005, CSEA General Council delegates voted to impose a "temporary dues increase (1/4th of 1 percent of salary)" or assessment, effective 1 September 2005, to create what CSEA characterizes as "a Political Fight Back Fund to be used for advertising, mail, voter registration and education, and get-out-the-vote activities...." CSEA Unity, September 2005, page 1 (a true and correct copy of said letter is attached hereto and incorporated herein as Exhibit B).

25. CSEA's temporary assessment, which actually ranges from 25% to 36% depending on the job classification and monthly salary, began with the 30 September 2005, paycheck issued to State employees, and is targeted primarily, if not wholly, at the defeat of certain ballot propositions in a special election to be held on 8 November 2005, fighting, *inter alia*, the

Governor's electoral and political financing policies, and to support other political and nonbargaining actions. Specifically, the temporary assessment will "be used specifically in the political arenas of California to defend and advance the interests of members of Local 1000 and the important public services they provide," and will be "used for a broad range of political expenses, including television and radio advertising, direct [8]mail, voter registration, voter education, and get out the vote activities in ... work sites and in ... communities across California." CSEA has represented specifically that "The Fund will not be used for regular costs of the union — such as office rent, staff salaries or routine equipment replacement, etc.," and that this temporary assessment will generate approximately $12 million for CSEA's political activities. Exhibit A.

26. CSEA's temporary assessment began with the 30 September 2005 paychecks issued to State employees. The normal $45.00 per month dues cap does not apply to this temporary assessment, and monthly dues now range from $29.78 for a janitor to $61.25 for an education consultant. Union dues in the amount of $66.77 was deducted from Plaintiff Conover's September paycheck.

27. CSEA opposes Propositions 75 & 76. The Alliance for a Better California, a coalition of the State's public employee labor unions, of which CSEA is a member which it actively supports, also opposes Propositions 74, 77, & 78, and supports Propositions 79 & 80. CSEA has contributed to the Alliance and other political committees opposing Propositions 75 & 76.

28. Plaintiffs support some or all of the propositions CSEA opposes, oppose some or all of the propo-

sitions CSEA supports, and/or do not believe that their dues or forced fees should be used on any ballot proposition and other political and nonbargaining activities.

29. Plaintiffs have a First Amendment right to prevent the temporary assessment from being used for or against ballot propositions and other political and nonbargaining activities which conflict with their own personal preferences.

30. Plaintiffs also have a First Amendment right to adequate procedures which will, *inter alia*, give the employees adequate advance notice of the political and other nonbargaining uses to which the temporary assessment is targeted. Such notice would allow them to make an informed decision on whether their union dues and/or agency fees are (or will be) used for political and other nonbargaining activities which conflict with their own personal preferences so that they can prevent the use of their moneys for ballot propositions and other political and nonbargaining activities that they oppose. ***See*** *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 306-10 (1986).

31. During the month of June 2005, CSEA sent a notice ("CSEA's 2005 Notice") to most or all of its nonmember employees. CSEA did not send any such notice to its members. This notice [9]preceded the vote for a temporary assessment by approximately two-to-three months, contained no notice that a political dues and fees increase would be included in the 2005-06 dues and fees, and stated that "Dues are subject to change without further notice to fee payers." A true and correct copy of said notice is attached hereto and incorporated herein as Exhibit C.

32. CSEA's 2005 Notice set the agency fee to be seized from 1 July 2005, through 30 June 2006 ("2005-06 fiscal year"), at 99.1% of dues. CSEA's 2005 Notice also informed nonmembers that a reduced agency fee of 56.35% of CSEA's annual dues, or 0.5635% of pay, would be charged to nonmembers who objected to paying the full agency fee and requested a rebate pursuant to the procedures and deadlines outlined in CSEA's 2005 Notice. The 56.35% is based on CSEA's actual expenditures for the year ending 31 December 2004, in which CSEA calculated chargeable expenditures to be 56.35% of its total expenditures.

33. On or about 31 August 2005, CSEA sent another letter, addressed to "Local 1000 Members and Fair Share Fee Payers." As it affected union members, *inter alia*, said letter announced the dues increase, and stated that "The $45 per month cap on our regular dues of 1% of gross pay will continue in effect, but will not apply to this additional .0025 temporary increase." As it affected nonmember objectors, *inter alia*, said letter announced that "Fair Share fees will rise by .002478 of gross monthly salary." A true and correct copy of said letter is attached hereto and incorporated herein as Exhibit D.

34. Since 1 September 2005, the agency fee deducted from the wages of all nonmember objectors by Westly and transmitted to CSEA for its spending has been increased by 0.2478% of salary, a 24.78% - 35.75% or more increase of monthly fees paid. Thus, the actual reduced agency fee charged objecting nonmembers in 2005-06 includes 99.12% of the 25% temporary assessment, which increase has been imposed solely for nonchargeable political and ideological purposes, resulting in a forced loan from them

that will be spent on the ballot propositions and other political and nonbargaining activities to which they object.

35. Since 1 September 2005, the agency fee deducted from the wages of nonmembers failing to object by Westly and transmitted to CSEA for its spending has been increased by 0.2478% of salary, a 24.78% - 35.78% increase of monthly fees paid.

[10]36. Since 1 September 2005, the dues paid by union members and collected by CSEA for its spending has been increased by 0.25% of salary, a 25%-36.10% or more increase of monthly dues paid.

37. Moreover, CSEA's pre-1 September 2005, spending on the ballot propositions and other political and nonbargaining activities facilitated by the temporary assessment will not be included in setting the new reduced agency fee percentage until 2006, more than six months after the initial seizures; and the 1 September through 8 November 2005, spending on the ballot propositions and other political and nonbargaining activities facilitated by the fee increase will not be included in setting the new reduced agency fee percentage until 2007, eighteen months later.

38. CSEA's usual agency fee procedure allows CSEA to force nonmembers to loan it the increased fee amount to spend and use on the ballot propositions and other political and nonbargaining activities, which CSEA will not begin to "repay" for six months and not fully "repay" until eighteen months after the first seizures. In addition, CSEA's repayment of the forced loan is contingent upon the nonmember remaining employed by the State in a bargaining unit

represented by CSEA, and objection in both of the subsequent years.

39. In early September 2005, after receiving Exhibit D hereto, Plaintiff Dobrowolski called CSEA's Sacramento office, and was told to call its Riverside office. He did so, and left a message for Jodi Smith, area manager, asking that she call him back. Smith returned his call and stated that, even if Dobrowolski objected to the payment of the full agency fees, *via* a letter in June, there was nothing he could do about the September increase for the temporary assessment. She also stated that "we are in the fight of our lives," and that the temporary assessment was needed, and that there was nothing that could be done to stop CSEA's expenditure of the temporary assessment for political purposes.

40. As a result of the timing of CSEA's increase in their dues and fees, the minimum procedures required by the First and Fourteenth Amendments to the United States Constitution, as explained in *Hudson*, have not been provided to the employees and the class they seek to represent, all of whom are potential objectors to CSEA's use of the increase in the dues and fees primarily, if not wholly, for ballot propositions, political and other nonbargaining purposes.

41. Specifically, CSEA has not provided Plaintiffs Knox, Blaylock, Dobrowolski, Gil, [11]Hass, Johnson, Jumper, and other nonmember State employees with an opportunity to object to the use of the fee increase on the ballot propositions, politics and other nonbargaining activities; and an immediate refund or reduction of the increased fee amount. Absent such immediate procedural protections, the nonmember State employees are forced to loan the increase in their fees to CSEA for its use and spending on the ballot propo-

sitions, politics and other nonbargaining activities which they oppose and which they cannot constitutionally be required to subsidize.

42. CSEA has not provided Plaintiffs Conover and Ricker and the other member State employees, who are potential objectors, with: (1) an opportunity to resign and, as nonmembers, raise an objection to the use of the dues/fee increase on the ballot propositions, politics and other nonbargaining activities; and (2) an immediate refund or reduction of the increased dues/fee amount. Without such immediate procedural protections, the member State employees are forced to loan the increase in their dues to the CSEA for its use and spending on the ballot propositions, politics and other nonbargaining activities which the members oppose and which they cannot constitutionally be required to subsidize.

FIRST CLAIM FOR RELIEF:
CONSTITUTIONALLY ADEQUATE PROCEDURES

43. The forgoing paragraphs are re-alleged.

44. The First and Fourteenth Amendments to the United States Constitution require that the procedures for the collection of compulsory union dues and fees be carefully tailored to limit the infringement on the public employees' fundamental First Amendment rights to freedom of speech, association, petition, belief and thought by facilitating the public employees' ability, as potential objectors, to protect those rights, including the right not to have their moneys used and spent on ballot propositions, political and other nonbargaining activities to which they object and the right not to have their objection met by a forced loan, followed by a rebate months, if not years, later.

45. Under color of state law, Defendants have collected and continue to collect an increase in compulsory dues and fees which CSEA has targeted, and will use and spend primarily on the upcoming ballot propositions election and for politics and other nonbargaining activities without first providing the carefully tailored procedures required by the First and Fourteenth Amendments to the [12]United States Constitution. This deprives the public employees of their constitutional right to due process and proper procedures.

SECOND CLAIM FOR RELIEF: FREE SPEECH

46. Paragraphs 1 through 42 are realleged.

47. Under color of state law, Defendants collect and continue to collect an increase in compulsory dues and fees from the public employees which CSEA has targeted, and will use and spend primarily on the upcoming ballot propositions election and for other political and nonbargaining activities contrary to the public employees' political preferences.

48. Without being provided with an immediate rebate of or reduction in the increase in dues and fees being used and spent on ballot propositions and other political and nonbargaining activities, the objecting public employees are being forced to loan the unions their money and are otherwise deprived of their right to free speech, free association and political autonomy under the First Amendment to the United States Constitution.

PRAYER FOR RELIEF

49. Unless immediately restrained by this Court, Defendants' seizure of the increase in dues and fees

from the named Plaintiffs' and class members' wages has directly caused, and will continue to cause, Plaintiffs and the class members they seek to represent to suffer the irreparable injury that is inherent in the violation of First Amendment rights and for which there is no adequate remedy at law and has deprived and will continue to deprive them of portions of their wages without due process of law.

WHEREFORE, the Plaintiffs request the following relief from this Court:

A. Temporary Restraining Order and/or Preliminary Injunction: Immediately issue, pending a hearing on Plaintiffs' prayer for permanent relief, a temporary restraining order and/or a preliminary injunction restraining Defendant CSEA, its officers, agents, assistants, successors, employees, attorneys, and all persons acting in concert or cooperating with it or at its direction or under its control, from accepting any payroll deductions or direct payment of the increase in union [13]dues and fees from the wages of any named Plaintiff and any of the class members they represent, from disbursing any of the increase in union dues and fees still in its possession and/or control, and requiring said Defendant to restore the *status quo* by placing any increase in dues and fees it has received or will receive into the registry of the Court or a Court-supervised escrow account, until further order of the Court.

B. Class Certification: Enter an order, as soon as practical, certifying this case as a class action consisting of the class of all individuals who pay compulsory dues or fees to Defendant CSEA, as outlined in the three subclasses identified in ¶ 13, *supra*; and appointing Plaintiffs' counsel as class counsel.

C. Declaratory Judgment: Enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, declaring:

> 1) that the named Plaintiffs and class members have a *constitutional right to an advance "Hudson"* notice of the temoprary assessment and increase in the dues and fees to be used in the upcoming ballot proposition special election and for other politics;
>
> 2) that the named Plaintiffs and class members have a constitutional right to receive advance notice of how they can object to their temporary assement being used in the upcoming ballot proposition special election and for other politics; and
>
> 3) that the objectors have a constitutional right to prevent the unions from using and spending the temporary assessment in the upcoming ballot proposition election and for other politics and from being forced to provide the unions with a loan for political purposes.

D. Permanent Injunction: Enter a permanent injunction which restrains Defendants, their officers, agents, assistants, successors, employees, attorneys, and all persons acting in concert or cooperating with them or at their direction or under their control, to place in escrow all of the money which they have collected or received and will collect or receive from the Plaintiffs and class members as a result of the temporary assessment, which CSEA has targeted wholly for ballot propositions, political activities and other nonbargaining activities, into the registry of the Court or a Court-supervised escrow account, until such time as the Court is satisfied that Defendants have provided all the necessary pre-collection safeguards and procedures mandated by the Constitution

[14]**E. Damages**: Award each named Plaintiff and class member compensatory damages or restitution from CSEA in the amount of the increase in the dues or fees collected and not previously returned, with statutory interest, that has been spent on, or targeted for, ballot propositions, political activities and other nonbargaining activities to which the Plaintiff and class member objects; and nominal damages from the appropriate Defendant for its violations of the Plaintiffs' and class members' rights under the First and Fourteenth Amendments to the United States Constitution.

F. Costs and Attorneys Fees: Pursuant to the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988, award the Plaintiffs their costs, including reasonable attorneys' fees, incurred in the litigation of this case.

G. Other: Grant the Plaintiffs such other and further legal or equitable relief as the Court may deem just and proper.

DATED: 1 November 2005

Respectfully submitted,

/s/

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ATTORNEYS FOR PLAINTIFFS AND THE
CLASS THEY SEEK TO REPRESENT

[PLAINTIFFS' EXHIBIT A]

SEIU LOCAL 1000 COUNCIL MEETING
July 30, 2005

Agenda Item:

SUBJECT: Emergency Temporary Assessment to Build a Political Fight-Back Fund

SUBMITTED BY: Local 1000 Special Defense Budget Committee

RECOMMENDED ACTION:

That the Local 1000 Council approve an emergency temporary assessment to increase the regular membership dues in an amount equal to .0025 (two and one-half tenths of one percent) of gross wages and an emergency temporary increase in the regular membership dues paid by permanent intermittent employees from $8 per month to $15 per month, with such increases remaining in effect during the pay periods between September 1, 2005 and December 31, 2006. The current dues structure of 1% of earnings to a maximum of $45 per month will continue in effect, but will not apply to this additional .0025 temporary increase.

These temporary emergency assessments are made necessary by political attacks on state employees and other public workers launched by Governor Schwarzenegger and his allies which threaten the wages, benefits and working conditions of Local 1000 members, and undermine the services they provide to the people of California.

The funds from this emergency temporary assessment will be used specifically in the political arenas of California to defend and advance the interests of members of Local 1000 and the important public services they provide.

BACKGROUND:

The Political Fight-Back Fund will be used for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California. The Fund will not be used for regular costs of the union--such as office rent, staff salaries or routine equipment replacement, etc.

Governor Schwarzenegger's effort to pass Proposition 76, the Power Grab Initiative, and Proposition 75, the Silence Our Voice Initiative must be defeated in the November 8 Special Election. While our immediate focus is on these two propositions, we must also defeat the initiative to destroy our retirement system which the Governor has promised to put on the ballot in June 2006. We must also have the resources to fight for the interests of Local 1000 members in the November 2006 election.

Proposition 76 gives the Governor exclusive power to declare a "fiscal emergency." With that power he can break any contract we negotiate, lay off state workers and make drastic cuts to schools, health care and other public services.

Proposition 75 would effectively silence our political voices while doing nothing to limit the influence of corporate special interests who dump millions of dollars into the political and legislative process.

With public employee unions removed from the political arena, the Governor's special interest allies would launch another initiative to destroy our pensions in June 2006, and then, in November 2006, elect a governor and legislature committed to their anti-worker policies.

The Governor will raise over $100 million from special interest allies to support his campaigns. He is already spending $2.5 million per week on television alone - on ads which attack state workers. We must match this war chest in order to beat him.

Local 1000 did not seek this conflict, nor do we have the resources to fight and win it without passage of this motion. All of our allies are in the same position. That's why the Teachers, Firefighters, Correctional Officers and others have passed motions similar to this, and why all other public worker unions are in the process of raising the extraordinary funds needed to defeat the Governor. Each of us must do our part to turn back these initiatives which would allow the Governor to destroy our wages and benefits and even our jobs, and threaten the well-being of all Californians.

ESTIMATED COST:

This motion would generate approximately $12 million.

FUNDING SOURCE:

DIVISION ACTION:

[PLAINTIFFS' EXHIBIT B]
[Logo omitted in printing]
September 2005

[1]California State Employees Association Unity Newsletter

Two New Payroll Deductions for Local 1000 Members Start in October

Local 1000 staff is gearing up for lots of phone calls when two new payroll deductions for Local 1000 members and fair-share fee payers take effect next month.

First, Local 1000 delegates voted late last month for a temporary dues increase (1/4th of 1 percent of salary), effective October 1, to create a Political Fight Back Fund to be used for advertising, mail, voter registration and education, and get-out-the-vote activities.

Second, deductions for the new State Disability Insurance (SDI) program included in the Local 1000 contract will also begin next month.

For further information, go to the Local 1000 Web site: **www.seiu1000.org** or contact Local 1000 President Jim Hard at **jhard@seiu1000.org**.

The Missing Link

Several Local 1000 members have contacted us to ask why the link to CSEA's home page: **www.calcsea.org** has been taken off of the Local 1000 Web site. They are upset because they no longer have direct access to information that's important to them as CSEA members.

Only Local 1000's leadership can answer that question. They made the decision to drop the link to CSEA's home page. You can ask Local 1000 President Jim Hard at **jhard@seiu1000.org** or his chief of staff, Michael Baratz, at **mbaratz@seiu1000.org**.

Do as I Say, Not as I Do

Local 1000 is quite correct in fighting back against the blatant attempts by the Schwarzenegger Administration to prevent them from communicating with its members. The problem has been especially egregious at Caltrans, (see story p. 2). Officials there have blocked access and authorized the arrest of Local 1000 representatives and their supporters for asserting their legal and contractual right to talk to their members in the workplace and provide them with information about bargaining and other important issues.

MYTH VS. FACT ABOUT PUBLIC EMPLOYEES

MYTH: California has too many public workers.
FACT: Adjusted for population, California has among the lowest numbers of state employees in the nation - and most work in education and public safety. In 2003, California ranked **47th** among the 50 states in the number of state employees per 10,000 people. During the same year, California ranked **42nd** among the 50 states in the combined number of state and local government workers per 10,000 residents.

Local 1000 also has complained about Caltrans officials removing union literature from break rooms and bulletin boards. Unfortunately, CSEA has the same problem at our own headquarters, just across the street. Someone is throwing away copies of *Unity* and CSEA fliers on Prop. 75 that are placed in our lobby for our members to read.

Could it be that someone from Caltrans is coming across the street and throwing away our fliers? Or is it a hypocrite from inside our own building? I guess we'll never know.

Don't Forget to Vote in the CalPERS Election!

KURATO SHIMADA	[graphic omitted in printing]	Vote for Candidate #3 on the ballot
CHARLES VALDES	[graphic omitted in printing]	Vote for Candidate #5 on the ballot

You should already have received your ballot for the CalPERS Board of Administration election. Your ballot must be returned by October 3. CSEA has endorsed Charles Valdes, candidate #5 for position A, and Kurato Shimada, candidate #3 for position B. (see story p. 2)

In Solidarity,

/s/
JJ

[PLAINTIFFS' EXHIBIT D]
[CSEA logo omitted in printing]

August 31, 2005

Dear Local 1000 Members and Fair Share Fee Payers,

On Saturday, August 27, Local 1000 delegates voted overwhelmingly for a temporary dues increase to create a Political Fight Back Fund. Over 320 delegates publicly endorsed the establishment of the fund prior to the vote. The fund will pay for advertising, mail, voter registration, voter education, and get out the vote activities to beat the Governor's anti-public employee agenda.

We will use this fund to defeat Proposition 76 and Proposition 75 on November 8. In June 2006, we'll have to defeat another attack on our pension plan. In November 2006, we need to elect a governor and a legislature who support public employees and the services we provide.

The action by the delegates increases the regular membership dues in an amount equal to .0025 (two and one-half tenths of one percent) of gross wages during the pay periods between September 1, 2005 and December 31, 2006. The $45 per month cap on our regular dues of 1% of gross pay will continue in effect, but will not apply to this additional .0025 temporary increase.

The delegates also approved an emergency temporary increase in the dues paid by permanent intermittent employees from $8 per month to $15 per month. This increase also will be in effect during the pay periods between September 1, 2005 and December 31, 2006. Fair Share fees will rise by .002478 of gross monthly salary.

All major public employee unions are taking similar action.

With this temporary dues increase we have the financial resources needed to win this fight for our future. Now each of us must take the next step.

- Make sure your co-workers, families, friends and neighbors are registered and get out to vote.
- Stay informed - go to www.seiu1000.org regularly, read the Union Update every Wednesday, and call the union hotline at 866-356-0160.
- Sign up to volunteer for phone banking, precinct-walking and other activities between now and November 8.
- Apply now for a personal day off on November 8, and spend Election Day working on this critical fight.

Working together, we can win!

/s/	/s/
JIM HARD	CATHY HACKETT
President	Vice President and Secretary-Treasurer
/s/	/s/
MARC BAUTISTA	RON LANDINGHAM
Vice President for Organizing/Representation	Vice President for Bargining

[1]UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

No. Civ. S 05-2198 MCE KJM

DIANNE KNOX; WILLIAM L. BLAYLOCK; ROBERT A.
CONOVER; EDWARD L. DOBROWOLSKI, JR.; KARYN GIL;
THOMAS JACOB HASS; PATRICK JOHNSON; JON JUMPER;
and R. PAUL RICKER, on Behalf of Themselves and
the Class They Seek to Represent,
Plaintiffs,
v.
STEVE WESTLY, Controller, State of California;
and CALIFORNIA STATE EMPLOYEES ASSOCIATION,
LOCAL 1000, SERVICE EMPLOYEES INTERNATIONAL
UNION, AFL-CIO-CLC,
Defendants.

ORDER

The above entitled matter came before the Court upon Plaintiffs' concurrent requests for a Temporary Restraining Order and a Preliminary Injunction. Plaintiffs include state workers [2]that have elected not to become members or have resigned membership of Defendant California State Employees Association, Local 1000, Service Employees International Union, AFL-CIO, CLC ("CSEA"). Plaintiffs motions seek to restrain CSEA from seizing that portion of Plaintiffs' agency fees attributable to a special assessment ("Special Assessment") that was approved by a vote of the CSEA General Council delegates on or about August 27, 2005. The motions further request that the portion of agency fees seized from Plaintiffs on or about September 30, 2005, and October 31, 2005, be placed into the registry of the Court or a Court-supervised escrow account until further order of this Court.

On November 2, 2005, Plaintiffs filed a complaint with this court and concurrently requested the issuance of a Temporary Restraining Order. The Court held a hearing on Plaintiffs' request for a Temporary Restraining Order that same day. Plaintiffs' counsel appeared in person and counsel for defendant CSEA appeared telephonically. The Court granted the requested Temporary Restraining Order.

In light of the pending special election to be held in California on November 8, 2005, the Court set an expedited briefing schedule on the requested Preliminary Injunction and heard oral argument on the requested injunctive relief on November 4, 2005 at which counsel for all parties appeared. At the conclusion of oral argument, the Court made findings in open court bearing on the ultimate propriety of granting a preliminary injunction and, for the reasons set forth below, concluded that injunctive relief is not warranted in this case.

[3]Plaintiffs salient contention is that CSEA imposed a twenty five percent (25%) increase in nonmember state workers' agency fees without satisfying the requisite constitutional protections inherent in the First and Fourteenth Amendments. For support, Plaintiffs reply on Chicago Teachers Union, Local No. 1, AFT, AFL-CIO, et. al., v. Hudson, et. al., 475 U.S. 292 (1986), wherein the Supreme Court balanced the right of a union to require every employee to contribute to the cost of collective-bargaining activities against the right of objecting

nonmembers to be free from compulsory subsidization of ideological activities with which they disagree. Id. at 303 (citing Abood v. Detroit Board of Education, 431 U.S. 209, 237 (1977). In striking that balance, the Court articulated a three part requirement which protects the constitutional rights and interests of both unions and individuals. Specifically, in order for a union to constitutionally seize funds from nonmember workers, the union must provide an adequate explanation of the basis for the fee, must provide a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and place in escrow the amounts reasonably in dispute while such challenges are pending. Id. at 310.

In this instance, CSEA provided Plaintiffs with a notice of proposed dues for 2005-2006 on June 30, 2005 ("June Hudson Notice"). That notice, while certainly compliant with Hudson for all regularly collected dues, did not expressly set forth the Special Assessment imposed on all state workers, including Plaintiffs, beginning September 30, 2005. The question raised by the imposition of this Special Assessment is whether the June [4]Hudson Notice was sufficient to satisfy the Hudson three part requirement as to the Special Assessment or whether this Special Assessment was so unusual as to require an additional Hudson notice.

A preliminary injunction is an extraordinary remedy, and Plaintiffs have the burden of proving the propriety of such a remedy by clear and convincing evidence. *See* Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 442 (1974). In order to warrant issuance of a preliminary injunction, a party must demonstrate either: 1) a combination of probable success on the merits and the possibility of irreparable injury; or 2) that serious questions are raised and the balance of hardships tips sharply in favor of granting the requested injunction. Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc., 240 F.3d 832, 839-40 (9th Cir. 2001). These two alternatives represent two points on a sliding scale, pursuant to which the required degree of irreparable harm increases or decreases in inverse correlation to the probability of success on the merits. Roe v. Anderson, 134 F.3d 1400, 1402 (9th Cir. 1998); United States v. Nutri-cology, Inc., 982 F.2d 1374, 1376 (9th Cir. 1985). Under either formulation of the test for granting a preliminary injunction, however, Plaintiffs must demonstrate a significant threat of irreparable injury. Oakland Tribune, Inc. v. Chronicle Publ'g. Co., 762 F.2d 1374 (9th Cir. 1985).

Plaintiffs assert that the June Hudson Notice was constitutionally infirm because the Special Assessment constituted a twenty five percent (25%) fee increase and was allocated to purely political purposes in violation of [5]Plaintiffs' First Amendment rights.[1] Plaintiffs go on to argue that if the Special Assessment is used for the purpose of speaking to specific political issues, they will be irreparably injured because their First Amendment right to free speech will be abridged. CSEA rebuts that Hudson does not require additional notice for a mid-year change in agency fees. Instead, CSEA argues that Hudson only requires unions to give a yearly notice based on proposed expenditures computed from the prior year's audited figures. In addition, CSEA objects to Plaintiffs' contention that the Special Assessment is purely for political purposes. Rather, CSEA avers that some of the Assessment will be expended for purposes chargeable to all state workers whether union members or not. This being the case, CSEA argues that it, too, has a right to speak and enjoining them from doing so would abridge its First Amendment rights.

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[1] The Special Assessment was set forth in a letter dated August 31, 2005, addressed to Local 1000 Members and Fair Share Fee Payers. (Plf.s' Exh. D) Therein, CSEA explained that the Special Assessment would be used to ". . . create a Political Fight Back Fund." Id. The letter went on to provide that the Special Assessment would be used to ". . . defeat Proposition 76 and Proposition 75 on November 8." Id.

The Supreme Court recognized that ". . . there are practical reasons why absolute precision in the calculation of the charge to nonmembers cannot be expected or required." Hudson, 475 U.S. at 307, n. 18. In the instant action, while the Special Assessment does depart from the figures presented to the Plaintiffs in the June Hudson Notice, such a departure is unquestionably permitted under the Hudson holding. See id. [6]In addition, Plaintiffs do not have a constitutional right to preclude Defendants from using their agency fees for certain expenses even when those expenses are clothed in political garb. See Lehnert et al. v. Ferris Faculty Assoc. et al., 500 U.S. 507 (1991).

In sum, Plaintiffs have failed to show that the balance of hardships tips sharply in favor of granting the requested injunction.

CONCLUSION

For the reasons set forth fully above, Plaintiffs motion for a preliminary injunction is DENIED.

IT IS SO ORDERED.

DATED: November 8, 2005

/s/
MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE

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Local 1000

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF CALIFORNIA

No. 2:05-CV-2198 MCE (KJM)

DIANNE KNOX; WILLIAM L. BLAYLOCK; ROBERT A. CONOVER; EDWARD L. DOBROWOLSKI, JR.; KARYN GIL; THOMAS JACOB HASS; PATRICK JOHNSON; JON JUMPER; AND R. PAUL RICKER, On Behalf Of Themselves and The Class They Seek To Represent,
Plaintiffs,

v.

STEVE WESTLY, Controller, State of California; and CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO-CLC,
Defendants.

STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000'S MOTION FOR SUMMARY JUDGMENT

Date: October 30, 2006
Time: 9:00 a.m.
Judge Hon. Morrison C. England, Jr.
Place: Courtroom 3
15th Floor

[1]UNDISPUTED FACTS

UNDISPUTED FACTS	RECORD EVIDENCE
1. In order to comply with the requirements of *Hudson*, defendant Service Employees International Union, Local 1000 ("SEIU Local 1000" or "Union") has implemented an elaborate accounting system for tracking and allocating its expenditures according to their chargeability. As part of this system, the Union assigns "activity codes" to every expenditure it makes.	1. Declaration of Lee King ("King Decl."), filed herewith, ¶¶ 5-12.
2. An activity code is a three-digit code entered into the accounting system that identifies the purpose of each expense item. The Union's *Hudson* notice	2. King Decl. ¶¶ 5, 8 & Exhs. A, C.

contains definitions and explanations regarding the various activity codes used by the Union. By assigning activity codes to each expenditure, the Union is able to total its expenditures with respect to every category of activity at the end of the fiscal year.	
3. All Union employees keep weekly time sheets, which they submit every two weeks. On those times sheets, employees allocate their time between the various activities with which they are involved.	3. King Decl. ¶ 6.
4. Activity code "100" represents the category "contract proposal, negotiations and ratifications." When an employee is performing this type of work on behalf of the Union, she will code her time with the activity code 100.	4. King Decl. ¶ 6.
5. Employees' time sheets are approved by supervisors and then forwarded to the accounting department and payroll staff, all of whom check the time sheets to ensure that all time is properly coded	5. King Decl. ¶ 6.

with an activity code and that all time is accounted for. In this way, at the end of the Union's fiscal year it can add up all employee time by activity and allocate the appropriate percentage of each employee's salary to the corresponding activities.	
6. Many activity codes are fully chargeable (*e.g.*, contract negotiations) or fully non-chargeable (*e.g.*, partisan political activities). But some activity codes are only partially chargeable or non-chargeable, and, after totaling the amount spent on these activities, the Union must analyze these expenditures to determine [2]how much went to chargeable and how much to non-chargeable activities.	6. King Decl. ¶ 8.
7. "Communications" is an example of a partially chargeable activity code. In order to determine the proper allocation of communications expenditures, the Union must calculate the total column-inches of printed publications in the	7. King Decl. ¶ 8.

year at issue and determine what percentage was chargeable and what percentage non-chargeable. For example, this calculation yielded the conclusion that 59.87% of the Union's expenditures on printed publications during 2004 were chargeable.	
8. Using this method of assigned activity codes to each expenditure, the Union is able to categorize and track all of its expenditures for a calendar year. After compiling this information, the data is audited by independent auditors. It is then displayed in tabular form in the Union's *Hudson* notice and forms the basis for the fair share fee to be paid by objecting nonmembers during the next fee year.	8. King Decl. ¶ 11.
9. The Union issues its *Hudson* notice every June. For 30 days after the issuance of the *Hudson* notice, nonmembers can submit an objection to paying for non-chargeable activities and thus pay the reduced rate during the upcoming	9. King Decl. ¶ 12.

fee year. During that 30-day period after issuance of the *Hudson* notice, nonmembers can also challenge the Union's calculation of its chargeable and non-chargeable expenses. Such challenges are resolved through arbitration.	
10. The Union and its auditors have determined that 56.35% of the Union's expenditures in 2004 were devoted to chargeable expenses; therefore, those nonmembers who objected in response to the 2005 *Hudson* notice paid no more than 56.35% of Union dues during the fee year covered by that notice.	10. King Decl. ¶¶ 15, 17 & Exh. A.
[3]11. The Union has separate activity codes related to SEIU International, to which the Union pays affiliation fees. The Union must base its chargeability allocation of its affiliation fees on the overall chargeability of the International's expenditures in the prior year.	11. King Decl. ¶ 9.

12. When calculating the Union's agency fee for 2005, the Union had to account for the affiliation fee it paid to SEIU International in 2004. Because SEIU International and its auditors determined that 24.61% of SEIU International's expenses in 2003 were chargeable, this is the chareability allocation the Union applies to its affiliation fee paid to the International in 2004. (The Union has to use the International's 2003 percentage because that was the latest audited data available from the International at the time the Union was calculating the chargeability of fees its paid in 2004.)	12. King Decl. ¶ 9.
13. A given fair share fee is in effect from July 1 until June 30 of the following year (the "fee year"), at which point the fair share fee set forth in the Union's next *Hudson* notice goes into effect.	13. King Decl. ¶ 12.

14. During the Summer of 2005, the democratic bodies within SEIU Local 1000 debated and passed a temporary dues assessment, equal to 0.25% of employees' gross wages, that increased fair share fees accordingly.	14. King Decl. ¶ 19.
15. Members' dues prior to implementation of the temporary assessment were 1% of their salary per month, with a $45 per-month cap, and fair share fees are calculated as a percentage of dues. The $45 per month cap that normally applies to dues and fees is not applied to the temporary assessment.	15. King Decl. ¶¶ 3, 19.
16. Objecting nonmembers pay only a proportionate share of the temporary assessment. In other words, those nonmembers who objected in response to the 2005 *Hudson* notice paid no more of the temporary assessment than their fair share fee chargeable percentage of 56.35%.	16. King Decl. ¶ 19.

[4]17. The temporary assessment took effect at the end of September 2005. The funds raised by the assessment have been referred to as the "Fight Back Fund" and have been used for a variety of Union activities.	17. King Decl. ¶¶ 19, 20.
18. The Fight Back Fund is not earmarked for specific activities. Rather, it is generally available to the Union for any use in advancing the Union's and public employees' interests in response to efforts by the Governor to weaken the rights and benefits currently enjoyed by the public employees represented by the Union. For example, as described in Union publications, the temporary assessment was intended to be used for purposes including but not limited to advertising, mail, voter registration, voter education, and get out the vote activities.	18. King Decl. ¶ 20; Plaintiffs' Verified Class Action Complaint (the "Complaint"), Docket No. 1, Exh. D; *see also id.*, Exh. B.

19. Among other things, the Union used funds generated by the assessment to support activities relating to California's November 8, 2005 special election, which involved various ballot initiatives that would have greatly affected the rights of the Union and those state employees it represents in collective bargaining. The Union also used the funds in defeating an attack on the Union's pension plan in June 2006, and the Union intends to use the Fight Back Fund to support activities surrounding the November 2006 election.	19. King Decl. ¶ 20; Complaint, Exh. D.
20. The special assessment is scheduled to terminate on December 31, 2006.	20. King Decl. ¶ 20.
21. In total, the temporary assessment is expected to raise approximately $12 million for the Union.	21. King Decl. ¶ 21.
22. As of December 31, 2005, the Union had spent approximately $3.7 million from the Fight Back Fund.	22. King Decl. ¶ 21.

[5]23. The Union's independent auditors conducted a separate audit of the expenditures from the Fight Back Fund in 2005 prior to issuing the Union's June 2006 *Hudson* notice, and the Union and its auditors concluded that 27.35% of the $3.7 million was spent on chargeable activities. This chargeable percentage, combined with the chargeable percentage for all other Union expenditures, yielded an overall chargeable percentage of 68.8% for 2005.	23. King Decl. ¶¶ 21, 23, 24 & Exh. C; Declaration of Richard M. Graham ("Graham Decl."), filed herewith, ¶ 5.
24. Among the partially chargeable expenditures from the Fight Back Fund were travel expenses related to a state-wide meeting of the Union's Bargaining Unit Negotiating Councils or "BUNCs," in December 2005. Although the BUNC meeting included discussion of certain non-chargeable political activities related to the November 2005 election, it was partially devoted to activities directly related to collective bargaining. Therefore, the expenses related to	24. King Decl. ¶¶ 20, 24.

this meeting were deemed partially chargeable. The Fight Back Fund has also been used to pay for a survey of Union members that was partially devoted to collective bargaining issues. Among the chargeable expenses from the Fight Back Fund were over $20,000 in attorneys' fees incurred in defending this lawsuit. In addition, a portion of the 2005 chargeable expenditures from the Fight Back Fund were devoted to efforts to defeat Proposition 76 in California's November 2005 special election.	
25. This putative class action is brought by a group of California public employees who are nonmember fee payers represented by the Union.	25. Complaint ¶ 8.
26. Plaintiffs allege that the procedures followed by the Union in the passage and implementation of the temporary assessment violated plaintiffs' rights under the First and Fourteenth Amendments of the Constitution.	26. Complaint ¶¶ 43-48.

[6]27. Plaintiffs claim that nonmembers' rights have been infringed because the Union allegedly failed to provide nonmembers with "an opportunity to object to the use of the fee increase on . . . ballot propositions [voted on in the November 8, 2005 California special election], politics and other nonbargaining activities; and an immediate refund or reduction in the increased fee amount."	27. Complaint ¶ 41.
28. June 2005 *Hudson* notice expressly informed all nonmembers that "[d]ues are subject to change without further notice to fee payers."	28. King Decl. ¶ 16 & Exh. A at 2.
29. The nature of the Union's elaborate accounting system and its methods of determining how much has been spent on chargeable versus nonchargeable activities is inherently retrospective.	29. King Decl. ¶ 13.

30. In August 2005, an arbitration was held regarding fee payers' challenges to the agency fee set forth in the Union's 2005 *Hudson* notice.	30. King Decl. ¶ 18 & Exh. B.
[7]31. The arbitration award from the August 2005 arbitration regarding the Union's 2005 *Hudson* notice states, in part: In his email dated August 17, 2005, [challenger] Mr. Prouty advised [the American Arbitration Association] of a meeting of the Union's General Counsel scheduled for August 27, 2005, at which a special dues increase was to be considered to establish a "political fight-back fund." Mr. Prouty is correct that expenses incurred for political activities which are not germane to collective bargaining are not chargeable to fee payers. However, Mr. Prouty misapprehends the methodology by which fair share fees are determined. Objecting fee payers are charged a percentage of the dues paid by members based on	31. King Decl., Exh. B at 6; *see also* King Decl. ¶ 18.

the chargeable portion of Union expenses in the Union's preceding fiscal year. Thus, the chargeable percentage for the current fee payer year, July 1, 2005 to June 30, 2006, is based on the Union's expenditures in the calendar year ending December 31, 2004. If the dues are increased or decreased, that same percentage is applied to the new amount. This methodology of computing the chargeable percentage has been upheld by the courts. To the extent the Union engages in non-chargeable activities in 2005, they will be reflected in the fee calculation for the 2006-2007 fee payer year. [Citations omitted.]	
32. In 2004 (as reflected in the Union's June 2005 *Hudson* notice), the Union and its auditors determined that the Union spent **56.35%** of its expenditures on chargeable activities. In 2005 (as reflected in the Union's June 2006 *Hudson* notice), the Union and its auditors	32. King Decl. ¶¶ 17, 23 & Exhs. A, C; Graham Decl. ¶¶ 3, 4.

determined that the Union spent **68.8%** of its expenditures on chargeable activities.	
33. Plaintiffs acknowledge that the Union provided notice to all members and fee payers in August 2005 that the temporary assessment had been passed and would be implemented in September 2005.	33. Complaint ¶ 33 & Exh. D.

[8]DATED: September 28, 2006

STEPHEN P. BERZON
JEFFREY B. DEMAIN
PEDER J. THOREEN
ALTSHULER, BERZON, NUSSBAUM,
RUBIN & DEMAIN

By: /s/ Peder J. Thoreen
Peder J. Thoreen

Attorneys for Defendant
Service Employees International Union,
Local 1000

[1]UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NO. 2:05-CV-2198-MCE-KJM

DIANNE KNOX; WILLIAM L. BLAYLOCK; ROBERT A. CONOVER; EDWARD L. DOBROWOLSKI, JR.; KARYN GIL; THOMAS JACOB HASS; PATRICK JOHNSON; and JON JUMPER, On Behalf of Themselves and the Class They Seek to Represent,
Plaintiffs,

v.

STEVE WESTLY, Controller, State of California; and CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO-CLC,
Defendants.

ORDER

Through the present action, Plaintiffs, state employees, have sued Defendants Steve Westly and California State Employees Association, Local 1000, Service Employees International Union, AFL-CIO, CLC ("CSEA" or "the Union").

[2]Plaintiffs allege that Defendants violated their First, Fifth, and Fourteenth Amendment rights under 42 U.S.C. § 1983 by, *inter alia*, using Plaintiffs' monies to support political causes without satisfying the procedural safeguards compelled by *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

Before the Court is Plaintiffs' Motion for Class Certification. For the reasons stated below, Plaintiffs' Motion is granted.

BACKGROUND

The Court has already set forth a detailed factual background for this action in its Order dated August 15, 2006, which is incorporated by reference and need not be reproduced herein. Mem. & Order 2-4, August 15, 2006. In that Order, the Court granted the Union's Motion for Judgment on the Pleadings as to Plaintiff Conover's claims as a Union member. *Id.* As a result of that August 15, 2006, Order, Plaintiffs have withdrawn that portion of their Motion seeking to certify Union members as part of the class. The Court agrees that, given the dismissal of Plaintiff Conover's claims as a Union member, certification as to a class consisting of Union members cannot be sustained. Plaintiff Conover, however, was not himself dismissed in that Order and remains a Plaintiff in this litigation as a non-union Plaintiff.

[3]STANDARD

A court may certify a class if a plaintiff demonstrates that all of the prerequisites of Federal Rule of Civil Procedure 23(a) have been met, and that at least one of the requirements of Federal Rule of Civil Procedure 23(b) have been met. *See* Fed. R. Civ. P. 23; *see also Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). Before certifying a class, the trial court must conduct a "rigorous analysis" to determine whether the party seeking certification has met the prerequisites of Rule 23. *Id.* at 1233. While the trial court has broad discretion to certify a class, its discretion must be exercised within the framework of Rule 23. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

Rule 23(a) provides four prerequisites that must be satisfied for class certification: (1) the class must be so numerous that joinder of all members is impracticable, (2) questions of law or fact exist that are common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. *See* Fed. R. Civ. P. 23(a). In addition, a plaintiff must establish one of the following: (1) that there is a risk of substantial prejudice from separate actions; (2) that declaratory or injunctive relief benefitting the class as a whole would be appropriate; or (3) that common questions of law or fact predominate and the class action is superior to other available methods of adjudication. *See* Fed. R. Civ. P. 23(b).

[4]ANALYSIS

1. Numerosity

As noted above, a class must be "so numerous that joinder of all members is impracticable" before the action is class certified. Fed. R. Civ. P. 23(a). A class numbering several thousand satisfies the numerosity requirement with ease. *Baird v. Ca. Faculty Ass'n*, 2000 U.S. Dist. LEXIS 13594, *8 (D. Cal. 2000) (citations and quotations omitted). Plaintiffs allege the class in this case is in the thousands and may be in the tens of thousands. Compl. ¶ 12. Such an allegation is sufficient to meet the numerosity requirement of Rule 23.

2. Commonality

A class has sufficient commonality if there are "questions of law or fact common to the class." Fed. R. Civ. P. 23(a) (2). The commonality preconditions of Rule 23(a) (2) are less rigorous than the companion requirements of Rule 23(b)(3). *Hanlon v. Chrysler*

Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). Indeed, Rule 23(a) (2) has been construed permissively. *Id.* All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class. *Id.*

[5]Here, the core legal theory advanced by Plaintiffs is that each was deprived of his or her constitutional right to an adequate explanation of the use of the fee increase; notice of the right to object to and not pay for that portion of the increase being used on the ballot propositions, politics and other non-bargaining activities; a prompt opportunity to challenge the amount of the increase, if any, that the Union claims was spent on collective bargaining; and an escrow of the amount in dispute. *See Hudson*, 475 U.S. at 307-10.

The foregoing allegations are plainly common questions of law as to all proposed class members. Plaintiffs allege an identical right not to have their fair share fee seized without the protections afforded by *Hudson*. Accordingly, the Court finds the requirement of commonality is met.

3. Typicality

The typicality prerequisite of Rule 23(a) is fulfilled if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Under the rule's permissive standards, representative claims are "typical" if they are reasonably co-extensive with those of absent class members; they need not be substantially identical. *Hanlon*, 150 F.3d at 1020.

CSEA vigorously contends that a class consisting of both objecting and non-objecting non-union members is insufficiently typical for class certification. [6]More precisely, CSEA contends that typicality does not exist because there are defenses to liability that exist against the class that do not exist against the named Plaintiffs. CSEA argues that both the objector and non-objector subclasses received a *Hudson* notice in June 2005. That notice, they allege, specifically alerted all non-members that their fair share fee is "subject to change without further notice to fee payers." Compl. ¶ 31. Given the foregoing language being included in the June *Hudson* notice, CSEA contends it will assert consent as a defense to the non-objecting class members. A defense that cannot, by definition, exist against the objecting named Plaintiffs.

As an initial matter, the suggestion that actual objectors cannot represent a class of potential objectors has already been rejected in this District. *See Friedman v. Cal. State Employees Ass'n*, 163 LRRM (BNA) 2924, 2327 (E.D. Cal. 2000). In addition, the theory of Plaintiffs' case is that the June notice itself was inadequate. Under that theory, whether a party objected or did not object is irrelevant because a requirement to object does not arise until adequate notice has been given. Consequently, the Court finds sufficient typicality to certify the class.

4. Adequacy of Representation

The final hurdle interposed by Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a) (4). [7]To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them. *See Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940). Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class? See *Hanlon*, 150 F.3d at 1020 (citing *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)).

Defendants here contend that the proposed class cannot be certified because of a conflict of interest. This conflict arises, they argue, because Plaintiffs are seeking punitive damages. During the oral argument before this Court, Plaintiffs clarified they were not seeking punitive damages and stipulated to amend their Complaint to remove any reference or claim for punitive damages. In light of this action by plaintiffs, CSEA's conflict of interest argument fails.

Further, the Ninth Circuit recently clarified that even had Plaintiffs not agreed to forego a pursuit of punitive damages, CSEA's argument would nonetheless have failed. This circuit does not favor denial of class certification on the basis of speculative conflicts. *See Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003); *see also Blackie v. Barrack*, 524 F. 2d 891, 909 (9th Cir. 1975) (noting that class members might have differing interests at later stages of litigation, but that "potential conflicts" do not present a valid reason for refusing to certify the class). Accordingly, the Court finds the [8]requirement of adequacy of representation satisfied.

5. Rule 23(b) (1) (A)

A class action may be certified under this subsection if individual litigation would create the possibility of inconsistent adjudications that "would establish incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b) (1) (A). Plaintiffs argue that all the proposed class members of potential objectors are owed the same duties under *Hudson* and that each, therefore, could bring an action to enforce his or her rights in either a state or federal forum. This scenario, Plaintiffs allege, would subject Defendants to a risk of incompatible standards of conduct as to their duties to members of the proposed class. The Court agrees. To the extent each state worker was entitled to a *Hudson* notice regarding the special assessment but did not receive that notice, each would have an independent cause of action for this alleged violation. Such a wide group of potential litigants could certainly give rise to incompatible standards of conduct. Accordingly, the Court finds this action proper for class certification under Federal Rule of Civil Procedure 12(b) (1) (A).

6. Appointment of Class Counsel

Plaintiffs request that W. James Young, a staff attorney employed by the National Right to Work Legal Defense Foundation, Inc., be appointed as class counsel pursuant to Federal Rule of Civil Procedure 23. [9]Defendants do not object to Plaintiffs' request or controvert in any way Mr. Young's ability to fairly and adequately represent the class. In addition, Plaintiffs have provided sufficient evidence that Mr. Young is competent to pursue this action on behalf of the class. In light of the foregoing and the Court's determination that Plaintiffs' Motion for Class Certification should be granted, the Court hereby appoints Mr. Young as class counsel.

CONCLUSION

The Court hereby grants Plaintiffs' Motion for Class Certification. The Court finds that the named Plaintiffs are adequate representatives of the class of individuals who pay compulsory fees to CSEA who are not members and who have, at one time or another, specifically objected to the use of their agency fees for politics or other non-bargaining activities. The Court further finds that Plaintiff Conover is an adequate representative of the class of individuals who pay compulsory fees to CSEA who are not members and who have not at any time objected to the use of their agency fees for politics or other non-bargaining activities.

IT IS SO ORDERED.

DATED: October 31, 2006

/s/
MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE

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The Classes They Represent

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CASE NO. 2:05-cv-02198 MCE KJM

DIANNE KNOX; *et al.*, ON BEHALF OF THEMSELVES
AND THE CLASSES THEY REPRESENT,
Plaintiffs,

v.

STEVE WESTLY, Controller, State of California; *et al.*,
Defendants.

PLAINTIFFS' STATEMENT OF GENUINE ISSUES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

HEARING DATE: Monday, 11
December 2006
TIME: 9:00 a.m.
**COURTROOM OF JUDGE ENGLAND,
COURTROOM 3, 15TH FLOOR**

Plaintiffs Dianne Knox, *et al.*, on behalf of themselves and the classes they represent ("the Employees"), by their undersigned counsel, and pursuant to Local Rule 56-260(b), E.D.CAL., submit their Statement of Genuine Issues in Opposition to Defendant Service Employees International Union, Local 1000's Motion for Summary Judgment, as follows:

DEFENDANT'S ITEMIZED FACTS

1. In order to comply with the requirements of *Hudson*, defendant Service Employees International Union, Local 1000 ("SEIU Local 1000" or "Union") has implemented an elaborate [2]accounting system for tracking and allocating its expenditures according to their chargeability. As part of this system, the Union assigns "activity codes" to every expenditure it makes.

PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement; however, the Employees dispute and challenge the self-serving characterizations contained therein.

2. An activity code is a three-digit code entered into the accounting system that identifies the purpose of each expense item. The Union's *Hudson* notice contains definitions and explanations regarding the various activity codes used by the Union. By assigning activity codes to each expenditure, the

Union is able to total its expenditures with respect to every category of activity at the end of the fiscal year.
PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement.

3. All Union employees keep weekly time sheets, which they submit every two weeks. On those time sheets, employees allocate their time between the various activities with which they are involved.
PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement.

4. Activity code "100" represents the category "contract proposal, negotiations and ratifications." When an employee is performing this type of work on behalf of the Union, she will code her time with the activity code 100.
PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement.

5. Employees' time sheets are approved by supervisors and then forwarded to the accounting department and payroll staff, all of whom check the time sheets to ensure that all time is properly coded with an activity code and that all time is accounted for. In this way, at the end of the Union's fiscal year it can add up all employee time by activity and allocate the appropriate percentage of each employee's salary to the corresponding activities.
PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement.

6. Many activity codes are fully chargeable (*e.g.*, contract negotiations) or fully non-chargeable (*e.g.*, partisan political activities). But some activity codes are only partially chargeable or non-chargeable, and, after totaling the amount spent on these activities, the Union must analyze these expenditures to

determine how much went to chargeable and how much went to non-chargeable [3]activities.

PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement.

7. "Communications" is an example of a partially chargeable activity code. In order to determine the proper allocation of communications expenditures, the Union must calculate the total column-inches of printed publications in the year at issue and determine what percentage was chargeable and what percentage non-chargeable. For example, this calculation yielded the conclusion that 59.87% of the Union's expenditures on printed publications during 2004 were chargeable.

PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement.

8. Using this method of assigned activity codes to each expenditure, the Union is able to categorize and track all of its expenditures for a calendar year. After compiling this information, the data is audited by independent auditors. It is then displayed in tabular form in the Union's *Hudson* notice and forms the basis for the fair share fee to be paid by objecting nonmembers during the next fee year.

PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement; however, the Employees dispute and challenge Local 1000's euphemistic characterization of its forced union dues as a "fair share fee."

9. The Union issues its *Hudson* notice every June. For 30 days after the issuance of the *Hudson* notice, nonmembers can submit an objection to paying for non-chargeable activities and thus pay the reduced rate during the upcoming fee year. During that 30-day period after issuance of the *Hudson* notice,

nonmembers can also challenge the Union's calculation of its chargeable and non-chargeable expenses. Such challenges are resolved through arbitration.
PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement, except to the extent that Local 1000 asserts that nonmember employees somehow "pay" something to Local 1000; union dues or agency fees are involuntarily seized from their wages pursuant to the special privilege granted pursuant to California law. CAL. GOVT. CODE § 3515.7(b).

10. The Union and its auditors have determined that 56.35% of the Union's expenditures in 2004 were devoted to chargeable expenses; therefore, those nonmembers who objected in response to the 2005 *Hudson* notice paid no more than 56.35% of Union dues during the fee year covered by that [4]notice.
PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement, except to the extent that Local 1000 asserts that nonmember employees somehow "pay" something to Local 1000; union dues or agency fees are involuntarily seized from their wages pursuant to the special privilege granted pursuant to California law. CAL. GOVT. CODE § 3515.7(b).

11. The Union has separate activity codes related to SEIU International, to which the Union pays affiliation fees. The Union must base its chargeability allocation of its affiliation fees on the overall chargeability of the International's expenditures in the prior year.
PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement.

12. When calculating the Union's agency fee for 2005, the Union had to account for the affiliation fee

it paid to SEIU International in 2004. Because SEIU Internation [*sic*] and its auditors determined that 24.61% of SEIU International's expenses in 2003 were chargeable, this is the chargeability allocation the Union applies to its affiliation fees paid to the International in 2004. (The Union has to use the International's 2003 percentage because that was the latest audited data available from the International at the time the Union was calculating the chargeability of its fees paid in 2004.)

PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement.

13. A given fair share fee is in effect from July 1 until June 30 of the following year (the "fee year"), at which point the fair share fee set forth in the Union's next *Hudson* notice goes into effect.

PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement; however, the Employees dispute and challenge Local 1000's euphemistic characterization of its forced union dues as a "fair share fee."

14. During the Summer of 2005, the democratic bodies within SEIU Local 1000 debated and passed a temporary dues assessment, equal to 0.25% of employees' gross wages, that increased fair share fees accordingly.

PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement; however, the Employees dispute and challenge Local 1000's euphemistic characterization of its forced union dues as a "fair share fee."

[5]15. Members' dues prior to implementation of the temporary assessment were 1% of their salary per month, with a $45 per-month cap, and fair share fees are calculated as a percentage of dues. The $45

per month cap that normally applies to dues and fees is not applied to the temporary assessment.

PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement; however, the Employees dispute and challenge Local 1000's euphemistic characterization of its forced union dues as a "fair share fee."

16. Objecting nonmembers pay only a proportionate share of the temporary assessment. In other words, those nonmembers who objected in response to the 2005 *Hudson* notice paid no more of the temporary assessment than their fair share fee chargeable percentage of 56.35%.

PLAINTIFFS' RESPONSE: The Employees **DISPUTE** the factual accuracy of this statement. To the contrary, as alleged and specified in Plaintiffs' Verified Class Action Complaint, since 1 September 2005, the agency fee deducted from the wages of all nonmember objectors by Westly and transmitted to CSEA for its spending has been increased by 0.002478% of salary, a 24.78% - 35.75% increase of monthly fees paid. Thus, the actual reduced agency fee charged objecting nonmembers in 2005-06 includes 99.12% of the 25% temporary assessment, which increase has been imposed solely for nonchargeable political and ideological purposes, resulting in a forced loan from them that has been and continues to be spent on the ballot propositions and other political and nonbargaining activities to which they object. Clerk's Docket No. 1: Plaintiffs' Verified Class Action Complaint, ¶ 34; **see also** *id.*, ¶ 36 & Exhibit D.[1]

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[1] Rule 56(c), FED.R.CIV.P., provides that "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

17. The temporary assessment took effect at the end of September 2005. The funds raised by that assessment have been referred to as the "Fight Back Fund" and have been used for a variety of Union activities.

PLAINTIFFS' RESPONSE: The Employees **DISPUTE** the factual accuracy of this statement, as the [6]temporary assessment took effect in September 2005, being first seized from wages paid at the end of that month.

18. The Fight Back Fund is not earmarked for specific activities. Rather, it is generally available to the Union for any use in advancing the Union's and public employees' interests in response to efforts by the Governor to weaken the rights and benefits currently enjoyed by the public employees represented by the Union. For example, as described in union publications, the temporary assessment was intended to be used for purposes including but not limited to advertising, mail, voter registration, voter education, and get out the vote activities.

PLAINTIFFS' RESPONSE: The Employees **DISPUTE** the factual accuracy of the statement that "The Fight Back Fund is not earmarked for specific activities." To the contrary, the "Emergency Temporary Assessment" was proposed and passed for the purpose of "Build[ing] a Political Fight-Back Fund" for "use[]d for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities

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any material fact and that the moving party is entitled to a judgment as a matter of law." Pursuant to 28 U.S.C. § 1746, the sworn declarations attached to Plaintiffs' Complaint as verifications constitute the functional equivalent of affidavits.

across California." Moreover, those proposing the special assessment specifically stated that "The Fund will not be used for regular costs of the union—such as office rent, staff salaries or routine equipment replacement, etc." Plaintiffs' Verified Class Action Complaint, Exhibit A.

19. Among other things, the Union used funds generated by the assessment to support activities relating to California's November 8, 2005 special election [*sic*], which involved ballot initiatives that would have greatly affected the rights of the Union and those state employees it represents in collective bargaining. The Union also used the funds in defeating an attack on the Union's pension plan in June 2006, and the Union intends to use the Fight Back Fund to support activities surrounding the November 2006 election.
PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement.

20. The special assessment is scheduled to terminate on December 31, 2006.
PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement.

21. In total, the temporary assessment is expected to raise approximately $12 million for the Union.
PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement.

[7]22. As of December 31, 2005, the Union had spent approximately $3.7 million from the Fight Back Fund.
PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement.

23. The Union's independent auditors conducted a separate audit of the expenditures from the Fight

Back Fund in 2005 prior to issuing the Union's June 2006 *Hudson* notice, and the Union and its auditors concluded that 27.35% of the $3.7 million was spent on chargeable activities. This chargeable percentage, combined with the chargeable percentage for all other Union expenditures, yielded an overall chargeable percentage of 68.8% for 2005.

PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement; however, the Employees note that it is inadmissible hearsay as to the amounts actually spent by Local 1000 on chargeable activities.

24. Among the partially chargeable expenditures from the Fight Back Fund were travel expenses related to a state-wide meeting of the Union's Bargaining Unit Negotiating Councils or "BUNCs," in December 2005. Although the BUNC meeting included discussion of certain non-chargeable political activities related to the November 2005 election, it was partially devoted to activities directly related to collective bargaining. Therefore, the expenses related to this meeting were deemed partially chargeable. The Fight Back Fund has also been used to pay for a survey of Union members that was partially devoted to collective bargaining issues. Among the chargeable expenses from the Fight Back Fund were over $20,000 in attorneys' fees incurred in defending this lawsuit. In addition, a portion of the 2005 chargeable expenditures from the Fight Back Fund were devoted to efforts to defeat Proposition 76 in California's November 2005 special election.

PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement, except to the extent that the Employees dispute Local 1000's conclusory legal assertions that some of its above-referenced expenditures were "partially chargeable" to the Employees.

25. This putative class action is brought by a group of California public employees who are nonmember fee payers represented by the Union.
PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement, except to note that what was a "putative" class action at the time of its writing has now been certified as a [8]class action. Clerk's Docket No. 81.

26. Plaintiffs allege that the procedures followed by the Union in the passage and implementation of the temporary assessment violated plaintiffs' rights under the First and Fourteenth Amendments of the Constitution.
PLAINTIFFS' RESPONSE: The Employees dispute Local 1000's characterization of their claim. In fact, the Employees allege that "Defendants have collected and continue to collect an increase in compulsory dues and fees which CSEA has targeted, and will use and spend primarily on the upcoming ballot propositions election and for politics and other nonbargaining activities without first providing the carefully tailored procedures required by the First and Fourteenth Amendments to the United States Constitution," and that "This deprives the public employees of their constitutional right to due process and proper procedures." Clerk's Docket No. 1, ¶ 45.

27. Plaintiffs claim that nonmembers' rights have been infringed because the Union allegedly failed to provide nonmembers with "an opportunity to object to the union of the fee increase on . . . ballot propositions [voted on in the November 8, 2005 California special election [*sic*]], politics and other nonbargain-

ing activities; and an immediate refund or reduction in the increased fee amount."

PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement.

28. June 2005 *Hudson* notice expressly informed all nonmembers that "[d]ues are subject to change without further notice to fee payers."

PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement; however, the Employees dispute and challenge the self-serving characterizations contained therein.

29. The nature of the Union's elaborate accounting system and its methods of determining how much has been spent on chargeable versus non-chargeable activities is inherently retrospective.

PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement; however, the Employees dispute and challenge the self-serving characterizations contained therein.

30. In August 2005, an arbitration was held regarding fee payers' challenges to the agency fee set forth in the Union's 2005 *Hudson notice.*

PLAINTIFFS' RESPONSE: The Employees **DISPUTE** the factual accuracy of this statement; in fact, while Local 1000's procedure might satisfy the "impartial decisionmaker" requirements of *Teachers Local* [9]*No. 1 v. Hudson*, 475 U.S. 292, 310 (1986), by its own terms, it is not "arbitration" in any meaningful sense of that word.[2]

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[2] No "arbitration" — as that word is normally understood — is provided to Employees who challenge Local 1000's fee calculation. "Arbitration" is a product of mutual consent, and Local 1000's impartial decisionmaker process is imposed solely by and at the discretion of Local 1000. Cases are legion where the

31. The arbitration award from the August 2005 arbitration [*sic*] regarding the Union's 2005 *Hudson* notice states, in part:

> In his email dated August 17, 2005, [challenger] Mr. Prouty advised [the American Arbitration Association] of a meeting of the Union's General Counsel [*sic*] scheduled for August 27, 2005, at which a special dues increase was to be considered to establish a "political fight-back" fund. Mr. Prouty is correct that expenses incurred for political activities which are not germane to collective bargaining are not chargeable to fee payers. However, Mr. Prouty misapprehends the methodology by which fair share fees are determined. Objecting fee payers are charged a percentage of the dues paid by members based on the chargeable portion of Union expenses in the Union's preceding fiscal year. Thus, the chargeable percentage for the current fee payer year, July 1, 2005 to June 30, 2006, is based on the Union's expenditures in the calendar year ending

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courts have affirmed this most elementary principle. **See** *AT & T Technologies v. CWA*, 475 U.S. 643, 648-49 (1986) [reaffirming the principle that "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration", **quoting** *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1963)]; *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299, 1304 (9TH CIR. 1994) (same) (arbitration agreement requires "knowing agreement to arbitrate . . . disputes"); **see also** Elkhouri & Elkhouri, *How Arbitration Works*, 3d ed., p. 26 ("Fundamentally, arbitration has been and still is a product of private **contract** . . . .") (emphasis added). Here, there is no contract between non-member Employees and Local 1000. There can be no "arbitration." All of Local 1000's references to "arbitration," an "arbitration hearing," and an "arbitrator" misuse these words, and arguably attempt to perpetrate a fraud upon the Court.

> December 31, 2004. If the dues are increased or decreased, that same percentage is applied to the new amount. This methodology of computing the chargeable percentage has been upheld by the courts. To the extent the Union engages in non-chargeable activities in 2005, they will be reflected in the fee calculation for the 2006-2007 fee payer year. [Citations omitted.]

PLAINTIFFS' RESPONSE: The Employees **DISPUTE** the factual accuracy of this statement for the same reasons stated in ¶ 30, *supra*.

32. In 2004 (as reflected in the Union's June 2005 *Hudson* notice), the Union and its auditors determined that the Union spent **56.35%** of its expenditures on chargeable activities. In 2005 (as reflected in the Union's June 2006 *Hudson* notice), the Union and its auditors determined that the Union spent **68.8%** of its expenditures on chargeable activities.

[10]**PLAINTIFFS' RESPONSE:** The Employees do not dispute the factual accuracy of this statement; however, the Employees note that it is inadmissible hearsay as to the amounts actually spent by Local 1000 on chargeable activities.

33. Plaintiffs acknowledge that the Union provided notice to all members and fee payers in August 2005 that the temporary assessment had been passed and would be implemented in September 2005.

PLAINTIFFS' RESPONSE: The Employees do not dispute the factual accuracy of this statement.

DATED: 16 November 2006

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS AND THE CLASSES THEY REPRESENT

CERTIFICATE OF SERVICE

I, W. James Young, counsel for Plaintiffs, hereby certify that I electronically filed with the Clerk of Court the foregoing **Plaintiffs' Statement of Genuine Issues In Opposition to Defendant Service Employees International Union, Local 1000's Motion for Summary Judgment,** using the CM/ECF system which will send notification of such filing to Defendants' counsel, this 16th day of November, 2006.

/s/ W. James Young
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Attorneys for Defendant Service Employees
International Union, Local 1000

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:05-CV-2198 MCE (KJM)

DIANNE KNOX; WILLIAM L. BLAYLOCK; EDWARD L. DOBROWOLSKI, JR.; KARYN GIL; THOMAS JACOB HASS; PATRICK JOHNSON; JON JUMPER; AND R. PAUL RICKER, ON BEHALF OF THEMSELVES AND THE CLASS THEY SEEK TO REPRESENT,
Plaintiffs,

v.

STEVE WESTLY, Controller, State of California; AND CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO-CLC,
Defendants.

STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: August 17, 2007
Time: 9:00 a.m.
Judge Hon. Morrison C. England, Jr.
Place: Courtroom 3, 15th Floor

[1]UNDISPUTED FACTS

UNDISPUTED FACTS	RECORD EVIDENCE
1. Plaintiffs are California state employees who are represented by Defendant Service Employees International Union, Local 1000 ("SEIU Local 1000" or "Union") in their employment relations with the state employer.	1. Plaintiffs' Verified Class Action Complaint (hereinafter "Complaint"), filed November 1, 2005, Docket No. 1, at ¶ 8.
2. Plaintiffs have chosen not to become members of the Union (or to resign their Union membership), and thus do not pay membership dues to the Union. Instead, as nonmembers, they pay a fair share fee to the Union.	2. Complaint ¶¶ 8(a), 8(b), and "Verification of Complaint" signed by plaintiff Robert A. Conover; Declaration of Lee King in Support of Defendant SEIU Local 1000's Motion for Partial Summary Judgment ("King Decl."), filed herewith, at ¶ 3.

3. The Union issues to its nonmember fair share fee payers a *Hudson* notice every June. A given fair share fee is in effect from July 1 until June 30 of the following year (the "fee year"), at which point the fair share fee set forth in the Union's next *Hudson* notice goes into effect.	3. King Decl. ¶ 4.
4. As the Union's *Hudson* notice makes clear, for a specified period of time after the issuance of the *Hudson* notice, nonmembers can submit an objection to paying for non-chargeable activities and thus pay the reduced rate during the upcoming fee year. As the notice also makes clear, during that same specified period after issuance of the *Hudson* notice, nonmembers can also challenge the Union's calculation of its chargeable and non-chargeable expenses, in which case the reasonably disputed portion of their fee will be held in escrow pending the resolution of any such	4. King Decl. ¶ 5 & Exhs. A at 2, B at 2 and C at 2.

challenge. Such challenges are resolved through arbitration.	
5. The Union's *Hudson* notice also makes clear that, if a nonmember fails to submit to the Union a timely objection to paying for non-chargeable activities or a timely challenge to the Union's calculation of its chargeable and non-chargeable expenses, the nonmember will be charged the full fair share fee, which includes a *pro rata* portion of those non-chargeable expenditures (including non-chargeable political expenditures).	5. King Decl. ¶ 6 & Exhs. A at 2, B at 2 and C at 2.
[2]6. In addition to informing nonmembers of their rights to object to paying for non-chargeable activities and to challenge the Union's calculation of its chargeable and non-chargeable expenses, the notice also (1) explains the basis for the calculation of the fair share fee; (2) discloses to nonmembers the audited financial information un-	6. King Decl. ¶ 7 & Exhs. A at 2, B at 2, and C at 2.

derlying that calculation; and (3) sets forth the procedures to be followed in exercising the rights to object and/or challenge.	
7. The Union's June 2005 *Hudson* notice, which covered the fee year July 1, 2005 through June 30, 2006, was sent to all nonmembers in June 2005. The Union's June 2006 *Hudson* notice, which covered the fee year July 1, 2006 through June 30, 2007, was sent to all nonmembers in June 2006. The Union's June 2007 *Hudson* notice, which covered the fee year July 1, 2007 through June 30, 2008, was sent to all nonmembers in June 2007.	7. Complaint at ¶ 31; King Decl. ¶ 8 & Exh. A at 2, Exh. B at 2, and Exh. C at 2.
8. The Union's June 2005, June 2006, and June 2007 *Hudson* notices provided fee payers with financial disclosure (audited statements of chargeable and non-chargeable expenditures) that set forth the major categories of the Union's expenses, based on the Union's actual expenses from the most	8. King Decl., Exh. A at 3-14, Exh. B at 3-18, and Exh. C at 3-20.

recent previously-audited calendar year (2004, 2005, and 2006, respectively). That financial disclosure classified those expenditures among chargeable, non-chargeable, and partially-chargeable/partially non-chargeable classifications, stating the chargeable and non-chargeable amounts for each such category of expenditure.	
[3]9. The financial disclosure presented in the Union's June 2005, June 2006 and June 2007 *Hudson* notices included categories of expenditure for non-chargeable expenditures, including certain types of political expenditures. That financial disclosure specifically identified the expense categories of "Political Education," "Political Activity and [Union Political Action Committee] Activities," "Screening and Watching Legislation," and "Legislative Activities Not Tied to Particular Legislation" as being fully or partially non-chargeable to objecting fee payers. Further,	9. King Decl., Exh. A at 3-4, 8-10, 13-14, Exh. B at 3-4, 8-14 16-18 and Exh. C at 3-4, 8-16, 18-20.

the Union's June 2006 and June 2007 *Hudson* notices included audited financial disclosure regarding the expenditures of the "Fight Back Fund."	
10. The Union's June 2005 *Hudson* notice informed all nonmembers that the Union and its auditors had determined that 56.35 percent of the Union's expenditures in 2004 were devoted to chargeable expenses. That notice therefore informed all nonmembers that the fair share fee for the fee year covered by the notice (July 1, 2005 through June 30, 2006) would be set at no more than 99.1 percent of regular membership dues for fee payers who did not submit a timely objection to paying for non-chargeable expenditures in response to that notice, and at no more than 56.35 percent of regular membership dues for fee payers who submitted such a timely objection.	10. King Decl., Exh. A at 2.
11. The Union's June 2005 *Hudson* notice in-	11. King Decl., Exh. A at 2.

formed all nonmembers of their right to object to paying for non-chargeable expenditures (and thereby pay a fair share fee of not more than 56.35 percent of regular membership dues), and of the procedure for submitting such an objection.	
12. The Union's June 2005 *Hudson* notice informed all nonmembers that membership dues (upon which the fair share fee is based) "are currently 1.0 % of monthly gross salary and are presently capped at a maximum of $45 per month."	12. King Decl., Exh. A at 2.
13. The Union's June 2005, June 2006, and June 2007 *Hudson* notices informed all nonmembers of the then-current amount of membership dues and stated expressly that "[d]ues are subject to change without further notice to fee payers."	13. Complaint ¶ 31 (re: June 2005 *Hudson* notice); King Decl., Exh. A at 2, Exh. B at 2, and Exh. C at 2.
[4]14. During the Summer of 2005, the legislative bodies within the Union debated and passed a temporary dues increase,	14. King Decl. ¶ 9; Complaint ¶¶ 23-24 & Exhs. A and D.

equal to 0.0025, or 0.25%, of employees' gross wages. This increased the dollar amount paid by nonmembers accordingly, since the fair share fee is a percentage of membership dues, but it did not increase the fair share fee as a percentage of membership dues.	
15. The temporary increase took effect at the end of September 2005.	15. Complaint ¶ 26.
16. The money raised by the temporary dues increase has been referred to as the "Fight Back Fund."	16. Complaint ¶¶ 23-24 & Exh. D; King Decl. ¶ 9.
17. The Union's independent auditors conducted separate audits of the financial statements of the "Fight Back Fund" prior to the issuance of the Union's June 2006 and June 2007 *Hudson* notices.	17. King Decl. ¶ 10 & Exh. B at 11-14, and Exh. C at 11-16.
18. The Union's June 2006 *Hudson* notice informed all nonmembers of their right to object to paying for non-chargeable expenditures, which included	18. King Decl., Exh. B at 2.

certain non-chargeable expenditures relating to the "Fight Back Fund," and of the procedure for submitting such an objection.	
19. The Union's June 2006 *Hudson* notice informed nonmembers that if they did not submit a timely objection to paying for non-chargeable expenditures, they would pay a fair share fee of no more than 99.1 percent of membership dues, whereas if they submitted a timely objection they would pay a reduced fair share fee of no more than 68.8 percent of membership dues, in the coming fee year.	19. King Decl., Exh. B at 2.
20. In response to the Union's June 2005 *Hudson* notice, 3,351 nonmembers submitted objections to paying for non-chargeable expenses and/or challenges to the Union's calculation of the fair share fee. This constituted 11.83 percent of all nonmembers of the Union. In response to the Union's June 2006	20. Declaration of Jade San Juan in Support of Defendant SEIU Local 1000's Motion for Partial Summary Judgment, filed herewith, at ¶ 3.

Hudson notice, 3,094 nonmembers submitted objections to paying for non-chargeable expenses and/or challenges to the Union's calculation of the fair share fee. This represented 10.50 percent of all nonmembers of the Union.	
[5]21. The Union's June 2006 and June 2007 *Hudson* notices included the audited expenditures made from the "Fight Back Fund" during the most recently-audited prior year (2005 and 2006, respectively) in the calculation of the fair share fee for the fee year covered by each of those notices.	21. King Decl., Exh. B at 4, 11-14, and Exh. C at 4, 11-16.
22. The dues and fees increase for the "Fight Back Fund" terminated at the end of December 2006.	22. King Decl. ¶ 11 & Exh. C at 2.
23. The Union's June 2007 *Hudson* notice informed all nonmembers of their right to object to paying for non-chargeable expenditures, and of the procedure for submitting such an objection.	23. King Decl., Exh. C at 2.

24. The Union's June 2007 notice informed nonmembers that if they did not submit a timely objection to paying for nonchargeable expenditures, they would pay a fair share fee of no more than 99.3 percent of membership dues, whereas if they submitted a timely objection they would pay a reduced fair share fee of no more than 60.3 percent of membership dues, in the coming fee year.	24. King Decl., Exh. C at 2.
25. Because the temporary increase for the "Fight Back Fund" terminated at the end of December 2006, the fair share fee to be collected under the Union's June 2007 *Hudson* notice does not include any money for the "Fight Back Fund".	25. King Decl. ¶ 12.
26. Plaintiffs' lawsuit was filed on November 1, 2005.	26. Complaint at page 1.
[6]27. On October 31, 2006, the Court issued an Order ("Order") in this case granting plaintiffs' motion to certify two classes of plaintiffs. Both classes consist of non-	27. Order, filed November 1, 2006, Docket No. 81.

members of the Union who are fair share fee payers. The first is a class of Hudson objectors. Order at 9:13-17. The second is a class of nonobjectors. Order at 9:19-22.

Dated: July 17, 2007.

Respectfully submitted,

STEPHEN P. BERZON
JEFFREY B. DEMAIN
PEDER J. THOREEN
Altshuler Berzon LLP

By: /s/ Jeffrey B. Demain
Jeffrey B. Demain

Attorneys for Defendant Service Employees International Union, Local 1000

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Attorneys for Defendant Service Employees
International Union, Local 1000

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:05-CV-2198 MCE (KJM)

DIANNE KNOX; WILLIAM L. BLAYLOCK; EDWARD L. DOBROWOLSKI, JR.; KARYN GIL; THOMAS JACOB HASS; PATRICK JOHNSON; JON JUMPER; AND R. PAUL RICKER, ON BEHALF OF THEMSELVES AND THE CLASS THEY SEEK TO REPRESENT,
Plaintiffs,

v.

STEVE WESTLY, Controller, State of California; AND CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO-CLC,
Defendants.

DECLARATION OF LEE KING IN SUPPORT OF SEIU LOCAL 1000'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: August 17, 2007
Time: 9:00 a.m.
Judge: Hon. Morrison C. England, Jr.
Place: Courtroom 3, 15th Floor

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[1]I, Lee King, hereby declare as follows:

1. I am currently employed by the California State Employees Association ("CSEA") as the Chief Financial Officer. I have been employed in this capacity since May 2004. My responsibilities include serving in this capacity for Service Employees International Union, Local 1000 (hereinafter "Local 1000" or "the Union"). I give this declaration in support of the Union's motion for partial summary judgment in the above-captioned case.

2. I have personal knowledge of the process for collecting fees from nonmembers and the amounts of those fees because I supervise the collection of those fees and have custody of the financial records governing those fees.

3. Plaintiffs have chosen not to become members of the Union (or to resign their Union membership), and thus do not pay membership dues to the Union. Instead, as nonmembers, they pay a fair share fee to the Union.

4. The Union issues to its non-member fair share fee payers a *Hudson* notice every June. A given fair share fee is in effect from July 1 until June 30 of the following year (the "fee year"), at which point the fair

share fee set forth in the Union's next *Hudson* notice goes into effect. Attached hereto as Exhibit A is a true and correct copy of the Union's 2005 *Hudson* notice. Attached hereto as Exhibit B is a true and correct copy of the Union's 2006 *Hudson* notice. Attached hereto as Exhibit C is a true and correct copy of the Union's 2007 *Hudson* notice.

5. As the Union's *Hudson* notice makes clear, for a specified period of time after the issuance of the *Hudson* notice, nonmembers can submit an objection to paying for non-chargeable activities and thus pay the reduced rate during the upcoming fee year. As the notice also makes clear, during that same specified period after issuance of the *Hudson* notice, nonmembers can also challenge the Union's calculation of its chargeable and non-chargeable expenses, in which case the reasonably disputed portion of their fee will be held in escrow pending the resolution of any such challenge. Such challenges are resolved through arbitration.

6. [2] The Union's *Hudson* notice also makes clear that, if a nonmember fails to submit to the Union a timely objection to paying for non-chargeable activities or a timely challenge to the Union's calculation of its chargeable and non-chargeable expenses, the nonmember will be charged the full fair share fee, which includes a *pro rata* portion of those non-chargeable expenditures (including non-chargeable political expenditures). (Of course, as the Union's *Hudson* notice also makes clear, at any time during the fee year a nonmember can object to contributing to the Union's Political Action Fund, at which time his or her fair share fee will be reduced by the amount of that contribution.)

7. In addition to informing nonmembers of their rights to object to paying for non-chargeable activities and to challenge the Union's calculation of its chargeable and non-chargeable expenses, the notice also (1) explains the basis for the calculation of the fair share fee; (2) discloses to nonmembers the audited financial information underlying that calculation; and (3) sets forth the procedures to be followed in exercising the rights to object and/or challenge.

8. The Union's June 2005 *Hudson* notice (Exhibit A), which covered the fee year July 1, 2005 through June 30, 2006, was sent to all nonmembers in June 2005. The Union's June 2006 *Hudson* notice (Exhibit B), which covered the fee year July 1, 2006 through June 30, 2007, was sent to all nonmembers in June 2006. The Union's June 2007 *Hudson* notice (Exhibit C), which covered the fee year July 1, 2007 through June 30, 2008, was sent to all nonmembers in June 2007.

9. During the Summer of 2005, the legislative bodies within the Union debated and passed a temporary dues increase, equal to 0.0025, or 0.25%, of employees' gross wages. This increased the dollar amount paid by nonmembers accordingly, since the fair share fee is a percentage of membership dues, but it did not increase the fair share fee as a percentage of membership dues. The money raised by the temporary increase has been referred to as the "Fight Back Fund."

10. The Union's independent auditors conducted separate audits of the financial statements of the Fight Back Fund prior to the issuance of the Union's June 2006 and June 2007 *Hudson* notices.

11. The dues and fees increase for the "Fight Back Fund" terminated at the end of December 2006.

[3]12 Because the temporary increase for the Fight Back Fund terminated at the end of December 2006, the fair share fee to be collected under the Union's June 2007 *Hudson* notice does not include any money for the Fight Back Fund.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Sacramento, California on July10, 2007.

/s/
Lee King

Exhibit A

[SEIU logo omitted in printing]

Notice to Fair Share Fee Payers

Dear Fair Share Fee Payer:

I'm writing to encourage you to become a member of our union, SEIU LOCAL 1000. I am surprised at how often I am told by workers that they believe they are union members because there is a deduction taken from their payroll check, when in fact, they are paying a fee for services. Our records indicate that you are not a union member and that you are paying a service fee. We would like to strongly urge you to become a member of the union at this time.

As a member, you'll enjoy the benefits of membership that are not available to you as a fair share fee payer. You'll have the right to participate fully in the internal activities of the union, which include the ability to vote in elections pertinent to your District Labor Council (such as officers and stewards) or the Local (local officers, dues, etc.) You will also be eligible to utilize the benefits offered by Service Employees International Union Local 1000 and CSEA.

Benefits include the SEIU Union Plus Mortgage and Real Estate Program, Unsecured Loan Program, legal services for personal matters, the SEIU MasterCard with no annual fee and a competitive rate, and several types of insurance plans. CSEA's member benefits include a wide range of insurance products, financial and legal services, discount entertainment tickets and travel services. There are many additional discounts and services provided to our members. However, the most significant benefit of a strong membership is strength at the bargaining table when we negotiate your contract. You should be aware that the union security clause contained in your contract was negotiated and ratified by your coworkers who are members so that everyone who benefits from the collective bargaining process shares in its cost. The support of its members is what helps the Union provide you with better wages, benefits and working conditions.

If you want to become a member of Local 1000, just fill out the enclosed membership application and send it back to us. We will process you're application and send you information on your District Labor Council, the Local, and the services and benefits to which you are entitled.

If you do not wish to join the union, however, California law permits collective bargaining agreements between the State of California and the SEIU Local 1000 that authorize the State Controller to deduct a fair share fee from the salary or wages of all SEIU LOCAL 1000 nonmembers of the bargaining units for which SEIU LOCAL 1000 is the exclusive representative. The fees are remitted to SEIU LOCAL 1000 on a monthly basis and are to be used to support SEIU Local 1000's work on behalf of fee payers and fellow employees with regard to their employment relations with the state. This notice and report are applicable for fair share fees collected by SEIU LOCAL 1000 for the period of July 1, 2005 through June 30, 2006.

In Solidarity
/s/
Jim Hard
President Local 1000

June 2005 Notice to Fair Share Fee Payers

AMOUNT OF THE FEE

Effective July 1, 2005 through June 30, 2006, the fee will be no more than 99.1% of regular membership dues. Regular monthly membership dues are currently 1.0% of monthly gross salary and are presently capped at a maximum of $45 per month. Dues are subject to change without further notice to fee payers.

This .9% reduction in the monthly fee from regular membership dues is designed to ensure, in accordance with SEIU LOCAL 1000's policy, that fee payers do not pay for the cost of providing benefits such as death benefits; group insurance plans and entertainment discount opportunities available only to SEIU LOCAL 1000 members. Provided along with this Notice is the SEIU LOCAL 1000 Audited Financial Statement for the year ended December 31, 2004, which describes the basis in SEIU LOCAL 1000's 2004 expenditures for setting its reduction at this level.

RIGHT TO OBJECT TO NON-GERMANE EXPENDITURES

SEIU Local 1000 believes that, since all of its activities are undertaken for the purpose of advancing the interests of the fee payers and other employees it represents, aside from member-only benefits provided to SEIU LOCAL 1000 members, it is appropriate that all such employees should contribute to these efforts to advance their interests as employees. However, the law provides that you have a right to object to the use of any portion of your fees for what you believe are activities not germane to the collective bargaining functions of SEIU Local 1000, i.e., partisan political or ideological causes only incidentally related to the terms and conditions of employment or the provision of benefits available only to members. In furtherance of this right to object, SEIU LOCAL 1000 has adopted a policy setting forth procedures for objection to or challenging the amount of the fee.

For purposes of understanding the SEIU LOCAL 1000 policy, SEIU Local 1000's expenditures may be grouped into two general categories—those which are germane to collective bargaining and therefore by law chargeable to all feepayers, even if they object, and those which are not germane to collective bargaining and therefore not chargeable to fee payers who object. The fair share fee has been calculated based on the union's expenditures for collective bargaining, grievances and arbitrations, contract administration and representation, as well as other relevant matters affecting the terms and conditions of your employment.

This fair share is legal and enforceable under California law and United States Supreme Court decisions. Further, this law and contract authorizes your employer to deduct the fee from your paycheck.

The criteria for determining a fair share fee have been approved by the courts and include the following:

1. Governing the union and the costs for conducting union elections.

2. Gathering information in preparation for the negotiation of collective bargaining agreements.

3. Gathering information from workers concerning collective bargaining proposals.

4. Negotiating collective bargaining agreements.

5. Adjusting grievances and arbitrations pursuant to the collective bargaining agreements, as well as

representing workers under civil service law or *regulations*.

6. Ratification of negotiated agreements.

7. Public advertising of negotiations or collective bargaining agreements, as well as on matters relating to representational interests in the collective bargaining process and contract administration.

8. Purchasing books, reports and advance sheets used in matters relating to the representational interests in the collective bargaining process and contract negotiations.

9. Paying technicians and professionals in labor law, economics and other subjects for services used in (a) negotiating and administering collective bargaining-agreements, and in (b) processing grievances and arbitrations.

10. Proceedings regarding the jurisdiction of the union under the AFL-CIO constitution.

11. Membership meetings and conventions, District Labor Councils and other Local wide meetings.

12. Expenditures for the publishing of those portions of newspapers and newsletters which in part concern matters of bargaining and representation.

13. Lawful impasse procedures, fact-finding, mediation, arbitration and economic action.

14. The prosecution or defense of litigation or charges before administrative agencies as to ratification, interpretation, or enforcement of collective bargaining agreements.

15. Legislative activities undertaken with employers of members of the bargaining unit in order to

enhance or protect wages, hours, and working conditions of bargaining unit members.

16. Supporting and paying affiliation fees to state and local councils to the extent that such support and fees relate to the representational interests of the union in the collective bargaining process and contract administration.

17. The prosecution or defense of litigation or changes to enforce rights relating to concerted activity, the duty of fair representation and collective bargaining, as well as collective bargaining agreements, and any litigation related to chargeable activities.

18. Social and recreational activities for all members of the bargaining unit, whether union members or not, designed to promote unity and cohesiveness of the bargaining unit in matters relating to wages, hours and working conditions.

19. Operating and administrative expenses, salaries and benefits apportioned to chargeable items, e.g., rent, utilities, etc.

The fair share fee does not include expenses, either direct or indirect, for the following activities:

1. Political campaigns, get-out-the-vote and voter registration.

2. Supporting and contributing to political organizations and candidates for public office.

3. Supporting and contributing to ideological causes and committees (which include issues of foreign affairs).

4. Member-only benefits.

5. Litigation not related to bargaining unit matters, collective bargaining and representation.

6. Organizing activities in potential new chapters and internal campaigns in current chapters.

An analysis of what SEIU Local 1000 has determined would have been subject to "exception" from fair share fees as expenditures not chargeable to objecting fee payers in 2004 is set forth in the SEIU LOCAL 1000 2004 Audited Financial Statement provided along with this Notice and incorporated by reference herein. This Statement itemizes and describes the major categories of expenditures by SEIU Local 1000. The amounts attributed to these categories of expenditures are taken from an independent audit of SEIU LOCAL 1000's 2004 financial records contained in the Financial Statement prepared by Hood & Strong LLP, a certified public accounting firm. This Statement shows that 56.35% of the expenditures were chargeable to objecting fee payers in 2004.

Effective July 1, 2005 through June 30, 2006 (the "2005-6 Fee Payer Year") SEIU Local 1000 will charge fee payers who object to expenditures not germane to collective bargaining a fee of no more than 56.35% of regular membership dues for that salary level. In order to obtain this reduced amount, you must send an objection letter to SEIU LOCAL 1000's Member Records Unit, 1108 "O" Street, Sacramento, CA 95814, stating that you object to any use of your fees during the 2005-6 Fee Payer Year for activities not germane to collective bargaining. Any objection letters submitted for prior Fee Payer Years are not applicable to the 2005-6 Fee Payer Year. Except for new employees hired after June 1, 2005, objection letters sent to SEIU Local 1000's Member Records Unit must be postmarked no later than July 25, 2005. Fee payers hired after June 1, 2005 must send to SEIU Local

1000's Member Records Unit letters of objection postmarked within 45 days of receiving their notice of being subject to Fair Share Fees deduction. Objection letters should include the objector's name, address, social security number, department and bargaining unit. Objectors are requested, but not required, to send the objection letter by certified mail in order to have proof that their objections were timely made and received by SEIU LOCAL 1000. Sending such a letter objecting to use of your fees for activities not germane to collective bargaining will also trigger an additional reduction in your fees in the amount of the Political Action Fund contributions as described below. You do not need to send a second letter to obtain that additional reduction in your fees.

RIGHT TO CHALLENGE THE AMOUNT OF THE FEE

SEIU LOCAL 1000 policy also provides fee payers who object as described above to the use of their fees for expenditures not germane to collective bargaining with the right to challenge, in a reasonably prompt hearing before an impartial decision-maker, the determination by SEIU Local 1000 to set the fee for objecting fee payers during the 2005-6 Fee Payer Year at no more 56.35% of membership dues for the fee payer's salary level.

A hearing date will be set no later than August 31, 2005 regarding the determinations set forth in the above paragraph that are challenged by objecting fee payers. The hearing is to take place before a neutral arbitrator selected through the American Arbitration Association. SEIU LOCAL 1000 will pay for expenses and costs of the arbitrator. Participants in the hearing will be notified of the precise dates and location of the hearing.

Fee payers who wish to participate in such a hearing before an arbitrator, and thus challenge the amount of the fee in the 2005-6 Fee Payer Year, must notify SEIU LOCAL 1000's Member Records Unit at 1108 "O" Street, Sacramento, CA 95814 of their desire to so participate by letter postmarked no later than July 25, 2005. The notice need not be sent separately from your objection letter, so long as it clearly indicates your desire to participate in a hearing to challenge the fee before an arbitrator. Such notice should, if possible, include the grounds for the challenge so that SEIU Local 1000 may be able to consider those grounds and determine whether any further reduction in the fee is warranted before the matter proceeds to hearing.

Pending the hearing challenging the amount of the fee, SEIU Local 1000 will place in an escrow account of Sacramento Commercial Bank, one hundred percent of the fee that is collected from any fee payer who has timely filed an objection to the use of fees for activities not germane to collective bargaining. Fees deposited in such escrow account earn interest at a variable money market rate, the highest rate available for a limited withdrawal account. In the event of a determination at the hearing that the amount chargeable under the law to such objecting fee payers is less than the amount of the fee charged by SEIU Local 1000 during the 2005-6 Fee Payer Year, SEIU LOCAL 1000 will reduce the amount of the fee for all eligible objecting fee payers in accordance with the results of the hearing.

POLITICAL ACTION REDUCTION

Fee payers are also entitled to have their fees reduced by the pro rata portion of the fee that goes to the Political Action Fund that SEIU LOCAL 1000 sets aside for contributions to candidates and initiative campaigns, and other partisan political activities. This amount changes periodically.

If you do not wish to make the political action contribution, please notify in writing SEIU LOCAL 1000's Member Records Unit, 1108 "O" Street, Sacramento, CA 95814, stating that you object to the collection of fees from you for the Political Action Fund (currently 50 cents per month), and any amount deducted after receipt of your request will be promptly refunded to you. If you have already requested and received the reduction of the political action contribution, you need not do so again.

CONSCIENTIOUS OBJECTIONS

Any employee who is a member of a bona fide religious body whose traditional tenets or teachings include objections to joining or financial supporting employee organizations, or has religious practices or beliefs including such objections, is not required to financially support SEIU LOCAL 1000. Instead, the State Controller will deduct from the paycheck an amount equal to the fair share fee and contribute it to a non-religious, non-labor charitable organization selected by the employee from those approved by the State Board of Control. Employees with such religious beliefs must request the required forms from SEIU LOCAL 1000's Member Records Unit, 1108 "O" Street, Sacramento, CA 95814. Please be advised that if such an employee requests individual representation in a grievance, arbitration or administrative hearing, SEIU LOCAL 1000 is authorized to charge a reasonable fee for such representation.

QUESTIONS

If you have any questions regarding the above described procedures and rights, please write SEIU Local 1000's Member Records Unit at the address noted above or call (916) 444-8134.

[1]HOOD & STRONG LLP
[Logo omitted in printing]

Independent Auditors' Report

THE BOARD OF DIRECTORS
UNION OF CALIFORNIA STATE WORKERS
S.E.I.U. LOCAL 1000
Sacramento, California

We have audited the accompanying Statement of Operating Expenses by Activity and the Allocation Between Chargeable, Non-Chargeable and Member-Only Benefits Expense (the Financial Statement) for the UNION OF CALIFORNIA STATE WORKERS S.E.I.U. LOCAL 1000 (the Local) for the year ended December 31, 2004. This statement is the responsibility of the Local's management. Our responsibility is to express an opinion on this statement based on our audit.

We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures to the financial statement. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audit provides a reasonable basis for our opinion.

The total expenses reflected in the Financial Statement are based on the operating expenses of the Local for the year ended December 31, 2004, with regard to the accounting policies based in Note 1. The allocations of operating expenses between chargeable, non-chargeable and member-only benefits expenses is based on the definitions and significant factors and assumptions described in Note 3. The accompanying statement was prepared for the purpose of determining the fair share cost of services rendered by the Local for employees who are represented by, but not members of, the Local. The accompanying statement is not intended to be a complete presentation of the Local's financial statements.

In our opinion, the Financial Statement presents fairly, in all material respects, the operating expenses of the local for the year ended December 31, 2004 and the allocation of operating expenses between chargeable, non-chargeable and member-only benefits expense, on the basis of the definitions and significant factors and assumptions described in Note 3, on the basis of accounting as discussed in Note 1.

This report is intended solely for the information and use of the Local and its agency fee payers and is not intended to be and should not be used by anyone other than these specified parties.

/s/ Hood & Strong LLP

April 25, 2005

[2]Union of California State Workers
S.E.I.U. Local 1000
Statement of Operating Expenses By Activity and the Allocation of Expenses Between Chargeable, Non-Chargeable, and Member-Only Benefits Expense

Year Ended December 31, 2004

[Heading omitted in printing of remaining document pages]

Activity Code	Activity	Total Expenses	Chargeable Expenses	Non Chargeable Expenses	Member-Only Benefits Expense
100	Contract Proposals, Negotiations and Ratification	$ 568,026	$ 568,026		
110/111	Contract Administration, Enforcement and Grievance Adjustment	6,110,746	6,110,746		
	Representation Before Governmental Boards or Agencies:				
120	Disciplinary matters	730,748	730,748		
121	Contracting Out	136,716	136,716		
122/123	SPB: Other matters, complaints and appeals	116,740	116,740		
124/125	PERB: Unfair labor practices	75,500	75,500		
126/127	PERB: Other matters	2,080	2,080		
128	PERS matters	13,561	13,561		
129	State licensing board matters	229		$ 229	
130	Board of control matters	757		757	
131	Unemployment Ins./ Workers Comp.	865		865	
132	Discrimination matters	156,129	156,129		
133	U.S. Dept. of Labor: FLSA matters	755		755	
135	Other state agency or board matters	6,452		6,452	
	Litigation:				
140	Contracting out litigation	7,263	7,263		
141	Discrimination litigation	18,034	18,034		
142	Other litigation on behalf of Local-represented employees or the Local which involves wages, hours, benefits, working conditions or other employee rights	151,343	151,343		
143	Fair Share Fee litigation and arbitration	10,011	10,011		
144	Other litigation which does not involve the wages, hours, benefits, working conditions or other employee rights of Local-represented employees	97,854		97,854	
150	Conferences, discussion or background reading concerning wages, hours, employee rights, representational skills, etc.	467,308	467,308		
170	Organizing in new units	1,180		1,180	
180	Membership Recruitment	163,792		163,792	
190	Political Education	444,829		444,829	
200	Community Service/Charitable Activities	46,125		46,125	
210	Other Activity (Job Related)	63,865	63,865		
211	Other Activity (Non-Job Related)	20,091		20,091	
220-226	Political Activity and CSEA-MAC				

The accompanying notes are an integral part of this statement.

LM Activity Code	Activity	Total Expenses	Chargeable Expenses	Non-Chargeable Expenses	Member-Only Benefits Expenses
245-248	Activities	1,139,841		1,139,841	
	Communications:				
230	Bargaining unit and corporate publications	99,671	59,673	39,998	
231	Newsline, leadership letters, *and other communiques*	48,966	29,310	19,656	
232	Public and media relations	62,201	37,240	24,961	
233	Other publications (Job Related)	133,123	79,701	53,422	
234	Other publications (Non-Job Related)	814		814	
235	Website	79,386	47,528	31,858	
	Legislative:				
240	Introduced, supported and *opposed legislation*	100,867	100,867		
242	Budgetary legislation	(3,880)	(3,880)		
243	Screening and watching legislation	41,799		41,799	
244	Legislative activities not tied to particular legislation	123,842		123,842	
	Meetings and Governance:				
250	General Council	106,289	106,289		
251	Board and officer meetings and activities	426,123	426,123		
252	Corporate and BUC meetings and activities	1,664,916	1,664,916		
253	Committee meetings - general subject matters	15,904	15,904		
254	DLC/Region meetings, administration and leadership training	948,802	545,232	340,650	$ 62,313
255	Internal disputes and election protests	10,830	10,830		
256/257	SEIU and other labor affiliate meetings and activities	16,453,257	3,508,505	12,914,752	10,776
258	Other meetings or activities regarding Local governance	17,939	17,939		
	Staff and Local Administrative Activities:				
260	General administration	1,081,070	883,533	189,537	3,249
261	Accounting/Financial management	1,286,503	1,058,415	224,086	3,842
262	Fair Share Fee administration	76,157	76,157		
263	Other administrative expenses/ office and equipment services	1,942,315	1,602,410	333,905	5,827
	Member-Only Benefits				

The accompanying notes are an integral part of this statement.

[4] Activity Code	Activity	Total Expenses	Chargeable Expenses	Non-Chargeable Expenses	Member-Only Benefits Expenses
270	Member death benefits	217,220		217,220	217,220
277/282	Member-only insurance benefits	17,776		17,776	17,776
	Total operating expenses	$37,872,693	21,339,671	16,533,023	321,510
		100.00%	56.35%	43.65%	0.85%

Reconciliation of Total Expenses to *Audited Financial Statement Expenses*	
Total Expenses Above	$37,872,693
Expenses included above, but netted against revenue audited financial statement:	
Chapter administration	(734,192)
Chapter forfeits (net of grants)	10,800
Dues deduction processing fee	(123,868)
Financial statement revenue, netted against expenses above:	
SEIU International rebates	4,067,164
Other income	33,314
Revenue credited to Local 1000 in the central support billing	(86,794)
Other reconciling license: **Prior year per capita taxes paid during 2004**	(6,337,673)
Audited Financial Statement Expenses	34,724,023

The accompanying notes are an integral part of this statement.

Union of California State Workers
S.E.I.U. Local 1000
Notes to Statement of Operating Expenses by Activity and the Allocation of Expense between Chargeable, Non-Chargeable and Member-Only Benefits Expense
Year Ended December 31, 2004

[Heading omitted in printing
of remaining document pages]

[5]**Note 1- Summary of Significant Accounting Policies:**

a. Nature and Purpose of the Local
The purpose of the Union of California State Workers S.E.I.U. Local 1000 (the Local) is to represent employees and retired employees of the State of California in the following matters: salary, benefits and working conditions, assistance in filing and pursuing employee grievances, legal representation on both an individual and class basis, technical assistance in matters of job classification, and legislative advocacy in support of programs beneficial to state employees and retirees.

The Local represents State of California Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20 and 21.

b. Affiliation
On January 23, 2004, the Local entered into an affiliation agreement with the Service Employees' International Union, AFL-CIO, CLC. The

Local has been designated as "Union of California State Workers Local 1000, SEIU, AFL-CIO." The Local pays per capita taxes to SEIU International.

The Local is also affiliated with the California State Employees Association (the Association). The Local reimburses the Association for its allocated share of Central Support costs.

c. Basis of Presentation

The accompanying statement was prepared for the purpose of determining the fair share cost of services rendered by the Local for employees represented by, but not members of, the Local. The accompanying statement is not intended to be a complete presentation of the Local's financial position, changes in its net assets, or its cash flows in accordance with accounting principles generally accepted in the United States.

d. Basis of Accounting

The books of account and the financial statements of the Local reflect the actual basis of accounting in accordance with accounting principles generally accepted in the United States. The amounts included in the accompanying statement are adjusted to a modified accrual basis as shown on page 4. The expenses detailed herein are from general operating net assets and do not include expenses from separate segregated net assets.

[6]e. Property and Equipment
Depreciation expense is computed using the straight-line method over the estimated useful life of the assets ranging from three to fifteen years.

f. Federal and State Income Taxes
The Local is organized pursuant to the General Non-Profit Law of the State of California and is exempt from State and Federal income taxes under I.R.C. 501(c)(5) and California Revenue and Taxation Code Section 23701A.

g. Estimates
The preparation of financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions that affect certain reported amounts and disclosures. Accordingly, actual results could differ from those estimates.

h. Background - Non-Member Fees
In 1986, the United States Supreme Court issued a decision regarding certain procedures that must be followed by a local union that is collecting fair share fees from nonmembers under a collective bargaining agreement with a public employer. In Chicago Teachers Union vs.

Hudson, the United States Supreme Court reaffirmed the constitutionality of such fair share fee agreements, originally upheld in Abood vs. Detroit Board of Education. In another earlier case, **Ellis** v. Railway Clerks, the United States Supreme Court had held that certain union expenditures could be charged to fair share fee payers, but that certain others could not be charged.

In 1988, the United States Supreme Court issued a decision holding that unions covered under the National Labor Relations Act (NLRA) may not charge non-members fees for *non*representational activities when the non-members are covered by collective bargaining agreements and object to such fees for nonrepresentational activities. That decision, known as Communication Workers of America vs. Beck, applies to the standard union shop, where the board and courts have long held that any bargaining unit employee may opt to be classified as a "financial core status employee" if he/she does not wish to join the union.

[7]Note 2- **Definitions:**

This statement sets forth the Local's activities and the expenditures associated with each activity. The numbering of each activity is from a coding system used by the Local to keep track of the time and expenses associated with each activity. Following each activity is a brief description of the nature of that activity and the type of expenditures included. These activities are grouped into three categories for this report: a) those activities determined by the Local to be fully chargeable for all fee payers, b) those activities determined by the Local to be entirely non-chargeable to objecting fee payers, c) those activities determined by the Local to be partly chargeable and partly non-chargeable to fee payers.

a. Chargeable Expenses

100 Contract Proposals, Negotiations and Ratification

This activity encompasses the development, presentation and ratification by employees of contract proposals. Such activity includes formulation of bargaining goals, priorities and proposals, together with related research and drafting of supporting arguments; Bargaining Unit Council and other meetings devoted to discussion of contract proposals, negotiations or ratification; the process of receiving input from bargaining unit employees through surveys, worksite meetings or other means regarding matters to be negotiated, including worksite committee development and meetings in support of bargaining; education, research and training related to contract proposals, negotiations, or ratification, including training and orientation of Bargaining Unit Council members; negotiation of contracts; participation in any impasse procedures related to contract negotiations (i.e., fact finding, mediation or arbitration); ratification by the bargaining units; preparation and distribution of material such as flyers, draft contracts, reports and other publicity work (both within and outside the Local, including public and media relations) regarding the status of contract proposals, negotiations and ratification; distribution of leaflets; demonstrations and job actions related to contract proposals, negotiations and ratification; and litigation arising out of activities in support of the Local's position on contract proposals, negotiations or ratification.

[8]110/114 Contract Administration, Enforcement and Grievance Adjustment

Activities that relate to administration and enforcement of the contract once negotiated include all aspects of handling grievances or arbitrations under the contract, including preparation, participation and follow-up, internal Local arbitration appeals, and any appeals or other proceeding (including court litigation) involving enforcement of the contract; all aspects of the job steward program, including steward training supervision, activities and meetings; providing information to employees through worksite meetings, mailers or otherwise about their rights under the contract, the grievance arbitration process, and problems or questions about contract administration issues; handling employees' questions and complaints on contracts rights, grievances and other contract administration issues, meetings, phone calls and correspondence with representatives of the State employer to discuss the interpretation of the contract generally or to discuss particular grievances or problems under the contract; BUC and other meetings devoted to discussion of problems relating to administration or implementation of the contract; and education, research and training related to grievance handling and other aspects of contract administration.

120 Disciplinary Matters
Representation of employees in disciplinary matters arising in the course of their employment.

121 / 140 Contracting Out / Contracting Our Litigation
Action by Local representatives to prevent the State of California from eliminating or reducing state jobs in

Local-represented units by entering into contracts with private employers for services available through state government employees.

122/123 SPB: Other Matters, Complaints and Appeals

Representation of employees before the State Personnel Board on such matters as examination appeals, classification disputes, appeals regarding voided appointments, and other merit-related appeals.

124/125 PERB: Unfair Labor Practices

The pursuit and defense of unfair labor practice charges before the Public Employment Relations Board (PERB) that arise from alleged violation of such matters as defined in statute.

126/127 PERB: Other Matters

Representation before PERB on such matters as petitions regarding the composition of units, unit modification or severance proposals, election challenges and injunctive relief.

[9]*128 PERS Matters*

Representation before the Public Employees Retirement System regarding health and welfare plans of state employees and on matters related to the funding of current and future retirement benefits.

132/141 Discrimination Matters/ Discrimination Litigation

Representation of employees charging work-related discrimination.

142 Other Litigation on Behalf of Local-Represented Employees or the Local Which Involves Wages, Hours, Benefits, Working Conditions or Other Employee Rights

This activity includes litigation on matters such as the prevention of transfers of funds from the Public Employees Retirement System to the State of California general operating account. This litigation also involves representation of individual unit members before courts of competent jurisdiction in defense of their wages, hours and working conditions, in instances where informal or administrative remedies are unavailable or have been exhausted.

143 Fair Share Fee Litigation and Arbitration

This activity includes litigation regarding challenges to the Local's right to collect fees, and annual arbitrations regarding the amount of the fees the Local charges to fee payers who have filed objections to paying for any activities not germane to collective bargaining.

150 Conferences, Discussion or Background Reading Concerning Wages, Hours, Employee Rights, Representational Skills, etc.

This activity includes all readings, meetings, conferences, or other activities not covered by another activity which provide background information or education as opposed to research on or development of specific proposals related to wages, hours, benefits, working conditions, employee rights, industry developments in public sector employment or labor relations, representational skills, or other matters pertinent to improving the working lives of Local-represented employees. This activity also includes general professional reading by staff, and the purchase and maintenance of publications used in such representation, such as the research and law libraries.

210 Other Activity (Job Related)

This is a miscellaneous category that is used only in the rare case when none of the other more descriptive categories apply to an activity involving wages, hours, benefits, working conditions, employee rights or other matters pertinent to improving the working lives of Local-represented employees.

[10]*240 Introduced, Supported and Opposed Legislation*
Research, analysis, writing, meetings, testimony or other legislative advocacy regarding legislation introduced, supported or opposed by the Local which relates to the wages, hours, benefits, working conditions, bargaining rights or other employee rights of all or some groups of Local-represented employees. Examples include legislation on contracting out, statutory rights of Local-represented employees, employee health and safety matters, and revisions to the bargaining process under HEERA.

242 Budgetary Legislation
Research analysis, writing, meetings, testimony or other legislative advocacy regarding budgetary legislation. Other legislative expenditures are in activities 240, 243 and 244.

250 General Council
Every two years, delegates from the Association's affiliates (including the Local), plus ex-officio delegates, meet as a General Council to elect statewide officers for the next two years, adopt budgets and consider resolutions regarding the Association's governance, goals, objectives and procedures.

251 Board and Officer Meetings and Activities

All aspects of preparation for, participation in and follow-up to Corporate and Bargaining Unit Council elections, meetings and other activities not concerned with a single subject matter covered by another activity.

252 Corporate and BUC Meetings and Activities

All aspects of preparation for, participation in and follow-up to Corporate and Bargaining Unit Council elections, meetings and other activities not concerned with a single subject matter covered by another activity.

253 Committee Meetings - General Subject Matter

All aspects of preparation for, participation in and follow-up to meetings of standing or ad hoc committees of the Board of Directors or of the Local that involve a general subject matter not covered by another activity and are concerned with wages, hours, benefits, working conditions or other employee rights of Local-represented employees.

255 Internal Disputes and Election Protests

Resolution of internal disputes, grievances and election protests, including costs of the Hearing Officers Panel.

[11]*258 Other Meetings or Activities Regarding Local Governance*
Meetings or activities related to Local governance that are not covered by other activities. This includes preparation for and participation in the follow-up to meetings of committees such as Bylaws, Policies and Procedures, and Operations; legal advice or other work regarding the Local's corporate status, bylaws and other governance matters; and meetings of Local-represented employees with Local board members, officers or other Local officials that are not on a specific subject covered by another activity.

262 Fair Share Fee Administration

b. Non-Chargeable Expenses

129 State Licensing Board Matters

130 Board of Control Matters

131 Unemployment Insurance / Workers Compensation

134 / 135 / 136 Other Federal or State Agency or Board Matters
Advice, consultation and inquiry of agencies on employment-related matters not covered in other activities.

144 Other Litigation Which Does Not Involve the Wages, Hours, Benefits, Working Conditions or Other Employee Rights of Local-Represented Employees

Litigation not chargeable to fee payers.

170 Organizing New Units

180 Membership Recruitment
All activities to obtain new members in bargaining units or divisions that are currently represented by the Local, including the cost of meetings held principally for that purpose as well as the costs of recruitment material.

190 Political Education
Costs related to education of members on political matters not chargeable to fee payers.

200 Community Service/Charitable Activities
Contributions or activities (i.e., benefit events or Local-sponsored volunteer activity) on behalf of community or charitable organizations.

[12]*211 Other Activity (Non-Job Related)*
This is a miscellaneous category used only when none of the other more descriptive categories apply to an activity which affects the lives of Local-represented employees more as general citizens than as employees, because it did not involve their wages, hours, benefits, working conditions, employee rights or other matters pertinent to improving their work lives. Examples of these

activities are participation in strike activity by other unions not directly involving Local-represented employees, and participation as a Local representative in meetings or conferences of organizations having no relationship to the wages, hours, benefits, working conditions, development in public sector employment, labor relations, representational skills or other matters pertinent to the working lives of Local-represented employees.

220-226, 245-248 Political Activity and the CSEA-MAC Activities

This category of expenditures reflects the Local's participation in political activity, including management of the Political Action Fund, a separate fund not included in the general fund account. This Fund is financed by a portion of dues and fees set by the Local's Board of Directors. Members and fee payers who inform the Local in writing that they do not wish to make such contributions to the Fund are not required to do so. Uses of this Fund include contributions to selected political candidates for California state office and to support or oppose ballot measures and initiatives. Other political activity of the Local includes the coordination of volunteer work on behalf of any political organization or candidate for political office as well as research, analysis, writing, meetings, financial contributions and other advocacy regarding ballot initiatives supported or opposed by the Local.

Since fee payers who object to a portion of their fees being used for the Political Action Fund would have had their fees reduced by that amount, the amount collected and transferred to the Fund ($652,123) is not included in the percentage calculations in this report. The remainder ($1,139,841), which reflects political expenditures apart from the amount transferred to the Political Action Fund, is excluded from the fees of objecting fee payers and is included in the percentage calculations in this report.

234 Other Publications (Non-Job Related)

243 Screening and Watching Legislation
Initial screening and analysis of legislation to determine whether the Local will take a position on it, and continued monitoring of legislation on which the Local has taken a "watch" position.

[13]*244 Legislative Activities Not Tied to Particular Legislation*
Legislative meetings or contacts not concerned with particular legislation, but undertaken for the purpose of

enhancing the Local's general effectiveness in the Legislature. Any meetings involving political action activities or support of particular legislators are included in activities 220-226 and 245-248.

270 Member Death Benefits
All costs of providing, promoting and administering the Local's member death benefits program.

271/282 Member-Only Insurance Benefits
The Local provides numerous opportunities for members to participate in insurance programs. The cost of plan administration is reimbursed by insurance carriers

c. Partially Chargeable/Non-Chargeable (Allocation methodology Note 3a)

230 Bargaining Unit Publications

231 Newslines, Leadership Letters and Other Communiqués
This activity includes all costs associated with leadership letters and any other reports or communiqués of a general nature concerning a variety of subject matters which are directed at Local-represented employees or leadership.

232/236 Public and Media Relations, Website
This activity includes all costs of the Local's media relations and public

relations activities (including such matters as the distribution of leaflets; website maintenance demonstrations, speeches, advertisements and press releases directed toward members of the general public) on matters not devoted to contract proposals, negotiations, ratification, or CSEA-MAC or other political activities.

233 Other Publications (Job Related)
This activity includes the production of publications (i.e., reports, brochures or handbooks—whether on a single subject or multiple subjects) that concern the wages, hours, benefits, working conditions or other employee rights of Local-represented employees, but do not relate to a single subject matter covered by one of the other activities.

[14]*254 DLC / Region Meetings, Administration and Leadership Training*
The local has District Labor Councils (DLC's) throughout the state that receive a portion of the Local's dues revenue for funding of state employee representation at the local level. Typical activities of the DLCs include newsletters to inform employees of Local decisions at committee and Board meetings, preparation of proposals for bargaining, preparation for the ratification decision, creation

of job steward committees and social gatherings. This activity includes the cost of all DLC and region meetings, the administration of DLCs (including monthly dues allocations) and the regions, and training of DLC and regional officers.

256/257 SEIU and Other Labor Affiliate Meetings and Activities
The Local participates in meetings and activities of its international affiliate, the Service Employees International Union (SEIU) and other regional labor organizations' affiliated with the SEIU (e.g., the SEIU State Council), with which the Local is also affiliated. This activity includes the cost of affiliation fees, which are used on a variety of activities including research and staff assistance to local affiliates such as the Local on bargaining, contract enforcement, field representation, organizing, and union governance. The SEIU also uses these fees for numerous other activities and expenditures such as its affiliation fees to the AFL-CIO, political activities, organizing, publications and administrative expenses.

260 General Administration
Includes staff meetings, discussion and staff memoranda of a general nature, including staff personnel matters, staff training (to the extent

not on a single subject covered by another activity), and typical administrative matters such as opening mail.

261 Accounting / Financial Management
Administration of the Local's financial affairs, including budgeting, cost analysis planning and control, computer systems development, accounting, payroll, record keeping and data processing.

263 Other Administrative Expenses / Office and Equipment Services
Other administrative matters not covered in activities 260-262, including expenses, related to the provision of office space, office supplies, corporate insurance, the switchboard, in-house mail delivery and messengers; legal representation (including litigation) regarding the Local's leases, contracts and other obligations with respect to third parties; dealings with the State Employees Building Corporation; the purchase, assignment and maintenance of vehicles and other equipment, and any other office or equipment matters.

[15]Note 3. **Significant Factors and Assumptions Used in the Allocation of Direct and Indirect Divisional Expenses for the Computation of Chargeable and Non-Chargeable Expenditures:**

a. Allocation - Specific Activity Codes

230, 231, 232, 233, 236 Publications, Letters, Communiqués & Public Relations
Based upon a review of the content of publications produced within these activity codes, an allowance of 40.13% of the Local's costs are non-chargeable to reflect the portion of the publications pertaining to activities that would not be chargeable to objecting fee payers

254 DLC/Region Meetings, Administration & Leadership Training
The financial information of the Local's DLC's has been audited by an external Certified Public Accountant. All expenditures allocated to these DLCs have been classified as chargeable and non-chargeable based on these audits. The expenditures of any DLCs that were not audited were classified as non-chargeable to objecting fee payers.

b. Allocation - Specific Activity Codes

256/257 SEIU and Other Labor Affiliate Meetings and Activities
A portion of the Local's affiliation expenditures is considered to be non-chargeable to reflect the portions of the

SEIU International's expenditures and expenditures paid to other affiliated groups that may be considered to be non-chargeable to objecting fee payers. Based upon an analysis prepared by the SEIU and audited by a Certified Public Accountant, it was concluded that 75.39% of the SEIU International's expenditures were not chargeable to objecting fee payers. The Local has applied the same 75.39% to its SEIU International expenditures.

[16]Other affiliated group expenditures are not audited by a Certified Public Accountant and are therefore considered non-chargeable to objecting fee payers

Expenditures	Total Expenses	Chargeable Expenses	Non-Chargeable Expenses	Member-Only Benefits Expenses
SEIU International	$14,256,420	$3,508,505	$10,747,915	$10,778
Other affiliated groups	2,196,837		2,196,837	
	$16,453,257	$3,508,505	$12,944,752	$10,778

260, 261, 263 General Administration, Accounting and Administrative Expense General administration, accounting and administrative expenses are primarily allocated based on the ratio of the combined total of chargeable, non-chargeable and member-only benefits expenses for all other activity codes which require administrative attention.

[17]TOAL & GRIFFITH, LLC
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Independent Auditor's Report

The Executive Board of the
Service Employees International Union,
AFL-CIO, CLC

We have audited the accompanying consolidated statement of expenses and allocation between chargeable expenses and non-chargeable expenses alternative basis of allocation of the Service Employees International Union, AFL-CIO, CLC - United States Division (the International Union) for the year ended December 31, 2003. This consolidated statement is the responsibility of the International Union's management. Our responsibility is to express an opinion on this consolidated statement based on our audit. We did not audit the total expenses reflected in Column A, of the consolidated financial statements. Total expenses were audited by other auditors whose report has been furnished to us, and our opinion, insofar as it relates to the amounts in Column A, is based solely on the report of the other auditors.

We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the consolidated statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the statement. An audit also includes assessing the accounting principles used and significant estimates made by the International Union's management, as well as evaluating the overall presentation of the consolidated statement. We believe that our audit provides a reasonable basis for our opinion.

The total expenses reflected in Column A of the consolidated statement agree to the expenses in the audited consolidated financial statement of the International Union for the year ended December 31, 2003; as modified to remove from expenses the per capita tax rebates paid to local unions of $10,204,666, political expenses paid from voluntary contributions of $2,349,224 and expenses associated with the Eastern and Western Conferences amounting to $326,875, which were paid from funds transferred upon the dissolution of the Eastern Conference affiliate. The allocation of expenses between chargeable (Column B) and non-chargeable (Column C) is based on the definitions and significant factors and assumptions described in Notes 2 and 3.

In our opinion, the consolidated statement referred to above presents fairly, in all material respects, the consolidated expenses of the Service Employees International Union, AFL-CIO, CLC - United States Division for the year ended December 31, 2003 modified as discussed in the preceding paragraph and the allocated consolidated expenses between chargeable and non-chargeable expenses, on the basis of the definitions and significant factors and assumptions described in Notes 2 and 3.

This report is intended solely for the information and use of the Service Employees International Union, AFL-CIO, CLC and its agency fee payers and is not intended to be and should not be used by anyone other than those specified parties.

/s/ Toal & Griffith, LLC
October 29, 2004

[18]SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC UNITED STATES DIVISION

CONSOLIDATED STATEMENT OF EXPENSE AND ALLOCATION BETWEEN CHARGEABLE EXPENSES AND NON-CHARGEABLE EXPENSES ALTERNATIVE BASIS OF ALLOCATION

YEAR ENDED DECEMBER 31, 2003

	Column A	Column B	Column C	
	Total Expenses	Chargeable Expenses	Non-Chargeable Expenses	Notes
GENERAL FUND				
Personnel Costs				
Organizing	$25,070,200	$6,838,146	$25,070,200	3a
Organizing campaign support	10,970,868	8,838,148	2,132,720	3a
Politics, government and community	2,453,758	-	2,453,781	3a
Union communications	5,064,528	2,476,316	2,808,213	3a
Leader support	6,714,824	5,954,257	759,657	3a
Administrative and financial services	4,457,970	3,353,785	1,108,182	3a
Professional fees and expenses	8,669,064	4,819,787	3,849,277	3b
Administrative expenses	9,634,164	3,606,958	6,025,306	3c
Contributions	2,111,162	-	2,111,162	3d
Payments to locals				
Subsidies	6,813,812	-	2,813,812	3e
Per capita tax rebates	10,204,855	10,204,855	-	3e
Reimbursements	985,772	965,772	-	3f
Political subsidies	1,493,105	-	1,493,105	3g
Conferences and meetings	3,654596	648,751	3,014,947	3h
Communications and media	557,241	424,948	442,293	3i
Special projects	(5,165)	(5,165)	-	3j
Affiliation fees and assessments	10,004,811	-	10,004,811	3j
Death gratuities	122,633	-	122,633	3k
Building expenses	3,783,165	1,420,920	2,372,245	3l
Member Telephone calls and visibility	799,868	-	799,868	3m
State Council return	776,114	776,114	-	3n
Total General Fund	114,487,090	43,506,948	70,960,142	

STRIKE AND DEFENSE FUNDS	5,433,572	5,433,572	-
POLITICAL EDUCATION AND ACTION FUNDS	7,794,055	-	7,794,055
COMMITTEE ON POLITICAL EDUCATION	2,349,224	-	2,349,224
UNITY FUND	43,400,147	-	43,400,147
CONVENTION FUND	155,465	155,485	-
LEGAL DEFENSE FUND	28,845	-	28,845
CONFERENCE FUND EXPENSES	325,675	325,675	-
Total expenses before modification	174,976,378	50,424,563	124,553,563
LESS			
Per capita tax rebate payments to locals	(10,204,555)	(10,204,555)	-
Political expenses paid from voluntary contributions	(2,349,224)	-	(2,349,224)
Conference Fund expenses	(325,575)	(325,575)	-
Total expenses as modified	$162,097,517	$39,593,322	$122,294,269
	100%	24.61%	75.39%

[19]SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC UNITED STATES DIVISION NOTES TO CONSOLIDATED STATEMENT OF EXPENSES AND ALLOCATION BETWEEN CHARGEABLE EXPENSES AND NON-CHARGEABLE EXPENSES ALTERNATIVE BASIS OF ALLOCATION

DECEMBER 31, 2003

[Heading omitted in printing of remaining document pages]

NOTE 1 - SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

Method of Accounting - The financial statement has been prepared on the accrual basis of accounting in accordance with generally accepted accounting principles.

Basis of Presentation - The accompanying consolidated statement of expenses and allocation between chargeable expenses and non-chargeable expenses was prepared for the purpose of determining the fair share cost of services rendered by the Service Employees International Union, AFL-CIO-United States Division (the International Union) for employees represented by, but not members of, the International Union and its affiliated local unions. This statement is not intended to be a complete presentation of the International Union's financial position, or changes in its net assets and its cash flows in accordance with generally accepted accounting principles.

Under the alternative basis of allocation, which has been required by certain jurisdictions, organizing expenses are to be considered to be non-chargeable.

Financial Statement Presentation and Principles of Consolidation - The International Union records its transactions in various funds, each a self-balancing group of accounts. Each fund reflects only those transactions applicable to its designated functional area. The following fund designations are established by the International Union's Constitution or determined by management:

General Fund - Records all activity not accounted for in the other funds and includes the general operations of the International Union - U.S. Division and the operations of 1313 L Street, N.W., Inc. (1313 L Street) a not-for-profit corporation formed to be a title holding corporation for the International Union's headquarters building. The General Fund includes the consolidated accounts of 1313 L Street. All significant intercompany account balances have been eliminated in consolidation.

Strike and Defense Funds - Established to financially assist local unions and members involved in strikes. In accordance with the International Union's constitution, local unions may withdraw their per capita payments from the Strike and Defense Local Fund after one year of making per capita payments.

Political Education and Action Funds (PEA) - Records all activities for political education and political action disbursed from per capita tax allocations.

Committee on Political Education Records all activities for political contributions disbursed from net assets received with donor imposed restrictions.

Unity Fund - The Unity Fund is a segregated fund financed from local union per capita payments that is used to finance breakthrough campaigns, coordinated bargaining, and other activities designed to increase density in SEIU's core industries. The Unity Fund is divided among the Building Service, Health Care, and Public Services Divisions and a discretionary fund.

[notation omitted in printing]

[20]Convention Fund - Records all activities for the convention of the International Union which meets every four years.

Other Funds - Established to account for assets which have been internally segregated for specific purposes as determined by the Executive Board.

Depreciation and Amortization - Depreciation and amortization of property, equipment, and improvements are computed over the estimated lives of the respective assets using the straight-line method.

Tax Status - The International Union is exempt from federal income taxes, except on net income, if any, from unrelated business activities, under Section 501(c)(5) of the Internal Revenue Code. 1313 L Street is exempt from income tax, except on net income, if any, from unrelated business activities, under Section 501(c)(2) of the Internal Revenue Code.

NOTE 2 - DEFINITIONS

The following definitions of chargeable and non-chargeable expenses are based on existing law and the international Union's Interpretation of court cases.

a. Chargeable Expenses - Chargeable expenses are those incurred by the International Union that reflect the share of the costs of operations of the International Union which are considered necessarily and reasonably incurred for the purpose of assisting local unions and councils in the performance of their duties as a representative of the employees in dealing with the employer on labor management issues, including the costs of: negotiating and administering the collective bargaining contract; settling grievances and disputes by mutual agreement, or in arbitration, [illegible] or otherwise; activities and undertakings normally and reasonably employed to implement duties of the local union or council as representative of the employees in the bargaining unit; and the maintenance of the International Union's, local unions' and councils' existence. The following are examples of expenditures classified as chargeable: preparation for and negotiations of collective bargaining agreements; contract administration including investigating and processing grievances; meetings, conferences, administrative, arbitral and court proceedings and pertinent investigation and research in connection with work-related subjects and issues; handling work-related problems of employees; and providing legal, economic, and technical expertise on behalf of employees in all work-related matters.

[notation omitted in printing]

[21]b. Non-Chargeable Expenses - Non-chargeable expenses are those expenses incurred by the International Union for the benefit and advancement of represented employees and their union which are not considered representational activities for non-members. Non-chargeable activities include those services that are ideological

or political in nature; those that are exclusively for the benefit of full union members; and those that otherwise are not considered germane to the collective bargaining process.

Activities that are classified as non-chargeable include the following: organizing, legislative and government activities outside the limited context of contract ratification or implementation; public relations and other efforts directed towards functional activities that are not considered germane to representing non-members in the collective bargaining process; political activity expenses which include support at the Federal, state, or local level; union publications to the extent they report on non-administrative or non-representational activities; donations; affiliation fees paid to a labor organization; and the cost of benefits that are not available to non-members.

NOTE 3 - SIGNIFICANT FACTORS AND ASSUMPTIONS USED IN THE ALLOCATION OF CONSOLIDATED EXPENSES BETWEEN CHARGEABLE AND NON-CHARGEABLE

a. Personnel Costs - The International Union has assigned all personnel to either program, leader support, or administrative and financial services departments. Program departments implement the programs of the International Union and provide services to affiliates and local unions. Administrative and financial services departments include the following departments: Accounting, Human Resources, Information and Technology, Meetings and Convention, Member Services, and Finance and General Administration. Leader support includes the Executive Department, the Executive Board, and the Firemen and Oilers Department. Personnel costs include salaries and wages, fringe benefits, payroll taxes, and reimbursed employee expenses.

Personnel costs of the organizing departments, field operations and campaign support departments, politics, government, and community departments, Union communications departments, leader support departments and the administrative and financial services departments have been allocated based on determinations made by the various department heads as to the percentage of time his or her department spends on chargeable and non-chargeable activities. The personnel costs of office and clerical personnel are allocated between chargeable and non-chargeable in the same percentage as their supervisors.

[notation omitted in printing]

[22]b. Professional Fees and Expenses - All professional fees and expenses for outside legal counsel are considered to be chargeable or non-chargeable based on the services performed. Accounting and auditing fees and expenses are considered to be fully chargeable. Other professional fees and expenses are considered to be chargeable or non-chargeable based on the service performed by the consultant. Chargeable activities include expenses for training, speakers, and research matters. Professional fees for consulting services in connection with organizing campaigns, political activities and legislative activities are considered to be fully non-chargeable.

c. Administrative Expenses - Administrative expenses include items such as rent and utilities, office supplies and expenses, investment charges, equipment rental and maintenance, computer expenses, other taxes, depreciation and amortization, printing, postage, telephone, subscriptions, insurance, and bad debt expense. These expenses are allocated to chargeable and non-chargeable expenses based on the same ratio as personnel costs.

d. Contributions - Contributions for charitable, civic, and labor-related purposes are not directly related to the function of representation and are considered to be fully non-chargeable.

e. Payments to Locals - Payments to locals which represent subsidies for organizing are considered to be fully non-chargeable. Payments to locals which represent reimbursements for operating expenses are considered to be fully chargeable. The total expenses as reported in the audited consolidated financial statement have been modified to remove from expenses the per capita tax rebates paid to local unions.

f. Political Subsidies - Political subsidies are considered to be fully non-chargeable.

g. Conference and Meetings Expenses for conferences and meetings are allocated between chargeable expenses and non-chargeable expenses based on the purpose of and topics discussed at the meetings. Items of a political, legislative, or organizing nature are considered to be non-chargeable. Educational training programs and conferences for local, state and national staff, which are to enhance skills in collective bargaining, grievance handling, and contract administration are considered to be fully chargeable since they pertain to matters which are germane to collective bargaining. Executive Board meetings and meetings which pertain to the governance of the International Union such as formulating and communicating union internal policy are considered to be fully chargeable.

[notation omitted in printing]

[23]h. Communications and Media - Direct printing and publishing expenses of the publications are allocated based on the specific content of articles in the publications such as the International Union's magazine, SEIU Action, which is distributed to all members and agency fee payers and the newsletter, Bold Action Fax. Expenses allocable to articles considered to be political or ideological in nature are considered non-chargeable. Expenses allocable to reporting on legislative and lobbying activities, litigation activities, illegal strike activities,

organizing and articles relating to enhancement of the reputation of the International Union as a whole are considered to be non-chargeable. The content of articles deemed chargeable are directly related to issues on collective bargaining and contract administration. These articles include topics such as collective bargaining contracts negotiated by locals throughout the country. The expenses relating to the maintenance of the International Unions website have been allocated based on an assessment of the content included on the website throughout the year.

i. Special Projects - Special projects are considered to be chargeable or non-chargeable based on an analysis of the nature of the special project conducted.

j Affiliation Fees and Assessments - Per capita taxes and assessments paid to the AFL-CIO and affiliated labor organizations are considered to be fully non-chargeable.

k. Death Gratuities - Death gratuities are benefits paid to a deceased member's family and are considered to be fully non-chargeable.

l. Building Expenses - This category represents expenses incurred by 1313 L Street for the operation and maintenance of the International Union's headquarters building, such as utilities, real estate taxes, insurance, repairs and maintenance and other related expenses. These expenses are allocated to chargeable and non-chargeable expenses based on the same ratio as personnel costs.

m. Member Telephone Calls and Visibility - These expenses are considered to be fully non-chargeable.

n. Regional Conferences and Joint Council Meetings - The International Union returns a portion of per capita taxes received from the local unions to the International Union's councils for regional conferences and joint council meetings. These governance meetings are considered to be fully chargeable.

o. Strike and Defense Funds Expenses of the strike and defense funds include financial assistance to local unions involved in legitimate strikes in addition to providing financial assistance for educational programs including newspaper advertisements, leaflets, handbills, and other media-based messages concerning contract ratification. Expenses also include local union withdrawals of their per capita tax payments. All expenses of the strike and defense funds are considered to be fully chargeable.

[notation omitted in printing]

[24]p. Political Education and Action Funds - Expenses incurred by the Committee on Political Education and the Political Education and Action Funds relate entirely to political and legislative activities and are considered to be fully non-chargeable. The total expenses as reported in the audited consolidated financial statement have been modified to remove from expenses the political expenses paid from voluntary contributions.

q. Unity Fund - Expenses of the Unity Fund include financial assistance to local unions involved in breakthrough campaigns to increase union membership. These expenses are organizing in function and are considered to be fully non-chargeable.

r. Convention Fund - Expenses for the International Union's convention are considered to be fully chargeable.

s. Legal Defense Fund - Expenses incurred by the Legal Defense

Fund are considered to be fully non-chargeable.

t. **Eastern Conference Fund** Expenses incurred within this Fund are paid from funds transferred upon the dissolution of the Eastern Conference and are accordingly removed from the total expenses.

[EXHIBIT B]

[SEIU logo omitted in printing]

Notice to Fair Share Fee Payers

Dear Fair Share Fee Payer:

I'm writing to you to become a member of our union, SEIU LOCAL 1000. I am surprised at how often I am told by workers that they believe they are union members because there is a deduction taken from their payroll check, when in fact, they are paying a fee for services. Our records indicate that you are not a union member and that you are paying a service fee. We would like to strongly urge you to become a member of the union.

As a member, you'll enjoy the benefits of membership that are not available to you as a fair share fee payer. You'll have the right to participate fully in the internal activities of the union, which include the ability to vote in elections pertinent to your District Labor Council (such as officers and stewards) or the Local (local officers, contract ratification, strike votes, etc.) You will also be eligible to utilize the benefits offered by Service Employees International Union Local 1000 and CSEA.

Benefits include the SEIU Union Plus Mortgage and Real Estate Program, Unsecured Loan Program, legal services for personal matters, the SEIU MasterCard with no annual fee and competitive rate, and several types of insurance plans. CSEA's member benefits include a wide range of insurance products, financial and legal services, discount entertainment tickets and travel services. There are many additional discounts and services provided to our members.

However, the most significant benefit of a strong membership is strength at the bargaining table when we negotiate your contract. You should be aware that the union security clause contained in your contract was negotiated and ratified by your coworkers who are members so that everyone who benefits from the collective bargaining process and our contract shares in its cost. The support of its members is what helps us win better wages, benefits and working conditions. As of the writing of this report, we are locked in battle with the Governor to win raises and maintain our benefits.

If you want to become a member of Local 1000, just fill out the enclosed membership application and send it back to us. We will process you're application and send you information on your District Labor Council, the Local, and the services and benefits to which you are entitled.

If you do not wish to join the union, however, California law permits collective bargaining agreements between the State of California and the SEIU Local 1000 that authorize the State Controller to deduct a fair share fee from the salary or wages of all SEIU LOCAL 1000 nonmembers of the bargaining units for which SEIU LOCAL 1000 is the exclusive representative. The fees are remitted to SEIU LOCAL 1000 on a monthly basis and are to be used to support SEIU Local 1000's work on behalf of fee payers and fellow employees with regard to their employment relations with the state. This notice and report are applicable for fair share fees collected by SEIU LOCAL 1000 for the period of July 1, 2006 through June 30, 2007.

In Solidarity
/s/
Jim Hard
President Local 1000

June 2006 Notice to Fair Share Fee Payers

AMOUNT OF THE FEE

Effective July 1, 2006 through June 30, 2007, the fee will be no more than 99.1% of regular membership dues. Regular monthly membership dues are currently 1.0% of monthly gross salary and are presently capped at a maximum of $45 per month. Additionally, a temporary assessment of 1/4 of 1% of monthly gross salary is being collected through December 31, 2006. Dues are subject to change without further notice to fee payers.

This .9% reduction in the monthly fee from regular membership dues is designed to ensure, in accordance with SEIU LOCAL 1000's policy, that fee payers do not pay for the cost of providing benefits such as death benefits, group insurance plans and entertainment discount opportunities available only to SEIU LOCAL 1000 members. Provided along with this Notice is the SEIU LOCAL 1000 Audited Financial Statement for the year ended December 31, 2005, which describes the basis in SEIU LOCAL 1000's 2005 expenditures for setting the reduction at this level.

RIGHT TO OBJECT TO NON-GERMANE EXPENDITURES

SEIU Local 1000 believes that, since all of its activities are undertaken for the purpose of advancing the interests of the fee payers and other employees it represents, aside from member-only benefits provided to SEIU LOCAL 1000 members, it is appropriate that all such employees should contribute to these efforts to advance their interests as employees. However, the law provides that you have a right to object to the use of any portion of your fees for what you believe are activities not germane to the collective bargaining functions of SEIU Local 1000, i.e., partisan political or ideological causes only incidentally related to the terms and conditions of employment or the provision of benefits available only to members. In furtherance of this right to object, SEIU LOCAL 1000 has adopted a policy setting forth procedures for objecting to or challenging the amount of the fee.

For purposes of understanding the SEIU LOCAL 1000 policy, SEIU Local 1000's expenditures may be grouped into two general categories – those which are germane to collective bargaining and therefore by law chargeable to all feepayers, even if they object, and those which are not germane to collective bargaining and therefore not chargeable to fee payers who object. The fair share fee has been calculated based on the union's expenditures for collective bargaining, grievances and arbitrations, contract administration and representation, as well as other relevant matters affecting the terms and conditions of your employment.

This fair share is legal and enforceable under California law and United States Supreme Court decisions. Further, the law and contract authorizes your employer to deduct the fee from your paycheck.

The criteria for determining a fair share fee have been approved by the courts and include but are not limited to the following:

1. Governing the union and the costs for conducting union elections.

2. Gathering information in preparation for the negotiation of collective bargaining agreements.

3. Gathering information from workers concerning collective bargaining proposals.

4. Negotiating collective bargaining agreements.

5. Adjusting grievances and arbitrations pursuant to the collective bargaining agreements, as well as representing workers under civil service law or regulations.

6. Ratification of negotiated agreements.

7. Public advertising of negotiations or collective bargaining agreements, as well as on matters relating to representational interests in the collective bargaining process and contract administration.

8. Purchasing books, reports and advance sheets used in matters relating to the representational interests in the collective bargaining process and contract negotiations.

9. Paying technicians and professionals in labor law, economics and other subjects for services used in (a) negotiating and administering collective bargaining agreements, and in (b) processing grievances and arbitrations.

10. Membership meetings and conventions, District Labor Councils and other Local meetings.

11. Expenditures for the publishing of those portions of newspapers and newsletters which in part concern matters of bargaining and representation.

12. Lawful impasse procedures, fact-finding, mediation, arbitration and economic action.

13. The prosecution or defense of litigation or charges before administrative agencies as to ratification, interpretation, or enforcement of collective bargaining agreements.

14. Legislative activities undertaken with employers of members of the bargaining unit in order to

enhance or protect wages, hours, and working conditions of bargaining unit members.

15. Supporting and paying affiliation fees to state and local councils to the extent that such support and fees relate to the representational interests of the union in the collective bargaining process and contract administration.

16. The prosecution or defense of litigation or charges to enforce rights relating to concerted activity, the duty of fair representation and collective bargaining, as well as collective bargaining agreements, and any litigation related to chargeable activities.

17. Social and recreational activities for all members of the bargaining unit, whether union members or not, designed to promote unity and cohesiveness of the bargaining unit in matters relating to wages, hours and working conditions.

18. Operating and administrative expenses, salaries and benefits apportioned to chargeable items, e.g., rent, utilities, etc.

The reduced fair share fee rate paid by objectors does not include expenses, either direct or indirect, for the following activities:

1. Political campaigns, get-out-the vote and voter registration.

2. Supporting and contributing to political organizations and candidates for public office.

3. Supporting and contributing to ideological causes and committees (which include issues of foreign affairs) unrelated to terms and conditions of employment or the preservation of bargaining unit work.

4. Member-only benefits.

5. Litigation not related to bargaining unit matters, collective bargaining and representation.

6. Organizing activities in potential new chapters and internal campaigns in current chapters.

An analysis of what SEIU Local 1000 has determined would have been subject to "exception" from fair share fees as expenditures not chargeable to objecting fee payers in 2005 is set forth in the SEIU LOCAL 1000 2005 Audited Financial Statement provided along with this Notice and incorporated by reference herein. This Statement itemizes and describes the major categories of expenditures by SEIU Local 1000. The amounts attributed to these categories of expenditures are taken from an independent audit of SEIU LOCAL 1000's 2005 financial records contained in the Financial Statement prepared by *Hood & Strong* LLP, a certified public accounting firm. This Statement shows that 68.8% of the expenditures were chargeable to objecting fee payers in 2005.

Effective July 1, 2006 through June 30, 2007 (the "2006-7 Fee Payer Year") SEIU Local 1000 will charge fee payers who object to expenditures not germane to collective bargaining a fee of no more than 68.8% of regular membership dues for that salary level. In order to obtain this reduced amount, you must send an objection letter to SEIU LOCAL 1000's Member Records Unit, 1108 "O" Street, Sacramento, CA 95814, stating that you object to any use of your fees during the 2006-7 Fee Payer Year for activities not germane to collective bargaining. Any objection letters submitted for prior Fee Payer Years are not applicable to the 2006-7 Fee Payer Year. Except for new employees hired after June 1, 2006, objection letters sent to SEIU Local 1000's Member Records Unit must be postmarked no later than July 6, 2006. Fee payers hired after June 1, 2006 must send to SEIU Local 1000's Member Records Unit letters of objection postmarked within 45 days of receiving their notice of being subject to Fair Share Fees deduction. Objection letters should include the objectors name, address, social security number, department and bargaining unit. Objectors are requested, but not required, to send the objection letter by certified mail in order to have proof that their objections were timely made and received by SEIU LOCAL 1000. Sending such a letter objecting to use of your fees for activities not germane to collective bargaining will also trigger an additional reduction in your fees in the amount of the Political Action Fund contributions as described below. You do not need to send a second letter to obtain that additional reduction in your fees.

RIGHT TO CHALLENGE THE AMOUNT OF THE FEE

SEIU LOCAL 1000 policy also provides fee payers who object as described above to the use of their fees for expenditures not germane to collective bargaining with the right to challenge, in a reasonably prompt hearing before an impartial decision-maker, the determination by SEIU Local 1000 to set the fee for objecting fee payers during the 2006-7 Fee Payer Year at no more 68.8% of membership dues for the fee payer's salary level.

A hearing date will be set no later than August 31, 2006 regarding the determinations set forth in the above paragraph that are challenged by objecting fee payers. The hearing is to take place before a neutral arbitrator selected through the American Arbitration Association. SEIU LOCAL 1000 will pay for expenses and costs of the arbitrator. Participants in the hearing will be notified of the precise dates and location of the hearing.

Fee payers who wish to participate in such a hearing before an arbitrator, and thus challenge the amount of the fee in the 2006-7 Fee Payer Year, must notify SEIU LOCAL 1000's Member Records Unit at 1108 "O" Street, Sacramento, CA 95814 of their desire to so participate by letter postmarked no later than July 6, 2006. The notice need not be sent separately from your objection letter, so long as it clearly indicates your desire to participate in a hearing to challenge the fee before an arbitrator. Such notice should, if possible, include the grounds for the challenge so that SEIU Local 1000 may be able to consider those grounds and determine whether any further reduction in the fee is warranted before the matter proceeds to hearing.

Pending the hearing challenging the amount of the fee, SEIU Local 1000 will place in an escrow account at Sacramento Commercial Bank, one hundred percent of the fee that is collected from any fee payer who has timely filed an objection to the use of fees for activities not germane to collective bargaining. Fees deposited in such escrow account earn interest at a variable money market rate, the highest rate available for a limited withdrawal account. In the event of a determination at the hearing that the amount chargeable under the law to such objecting fee payers is less than the amount of the fee charged by SEIU Local 1000 during the 2006-7 Fee Payer Year, SEIU LOCAL 1000 will reduce the amount of the fee for all eligible objecting fee payers in accordance with the results of the hearing.

POLITICAL ACTION REDUCTION

Fee payers are also entitled to have their fees reduced by the pro rata portion of the fee that goes to the Political Action Fund that SEIU LOCAL 1000 sets aside for contributions to candidates and initiative campaigns, and other partisan political activities. This amount changes periodically.

If you do not wish to make the political action contribution, please notify in writing SEIU LOCAL 1000's Member Records Unit, 1108 "O" Street, Sacramento, CA 95814, stating that you object to the collection of fees from you for the Political Action Fund. Your monthly fee will then be reduced as soon as possible by the pro rata amount set aside for the Political Action Fund (regularly set at 50 cents per month, but temporarily increased to $6.70 per month until October 2006), and any amount deducted after receipt of your request will be promptly refunded to you. If you have already requested and received the reduction of the political action contribution, you need not do so again.

CONSCIENTIOUS OBJECTIONS

Any employee who is a member of a bona fide religious body whose traditional tenets or teachings include objections to joining or financial supporting employee organizations, or has religious practices or beliefs including such objections, is not required to financially support SEIU LOCAL 1000. Instead, the State Controller will deduct from the paycheck an amount equal to the fair share fee and contribute it to a non-religious, non-labor charitable organization selected by the employee from those approved by the State Board of Control. Employees with such religious beliefs must request the required forms from

SEIU LOCAL 1000's Member Records Unit, 1108 "O" Street, Sacramento, CA 95814. Please be advised that if such an employee requests individual representation in a grievance, arbitration or administrative hearing, SEIU LOCAL 1000 is authorized to charge a reasonable fee for such representation.

QUESTIONS

If you have any questions regarding the above described procedures and rights, please write SEIU Local 1000's Member Records Unit at the address noted above or call (916) 444-8134.

[1]HOOD & STRONG LLP
[Logo omitted in printing]

Independent Auditors' Report

THE BOARD OF DIRECTORS
UNION OF CALIFORNIA STATE WORKERS
S.E.I.U. LOCAL 1000 (dba S.E.I.U. Local 1000)
Sacramento, California

We have audited the accompanying Statement of Operating Expenses by Activity and the Allocation between Chargeable, Non-Chargeable, and Member-Only Benefits Expense (the Financial Statement) for the UNION OF CALIFORNIA STATE WORKERS S.E.I.U. LOCAL 1000 (dba S.E.I.U. LOCAL 1000) (the Local) for the year ended December 31, 2005. This statement is the responsibility of the Local's management. Our responsibility is to express an opinion on this statement based on our audit.

We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statement. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audit provides a reasonable basis for our opinion.

The total expenses reflected in the Financial Statement are based on the operating expenses of the

Local for the year ended December 31, 2005, with regard to the accounting policies based in Note 1. The allocation of operating expenses between chargeable, non-chargeable and member-only benefits expense is based on the definitions and significant factors and assumptions described in Note 3. The accompanying statement was prepared for the purpose of determining the fair share cost of services rendered by the Local for employees who are represented by, but not members of, the Local. The accompanying statement is not intended to be a complete presentation of the Local's financial statements.

In our opinion, the Financial Statement presents fairly, in all material respects, the operating expenses of the Local for the year ended December 31, 2005 and the allocation of operating expenses between chargeable, non-chargeable and member-only benefits expense, on the basis of the definitions and significant factors and assumptions described in Note 3.

This report is intended solely for the information and use of the Local and its agency fee payers and is not intended to be and should not be used by anyone other than these specified parties.

/s/ Hood & Strong LLP

April 21, 2006

[2]Union of California State Workers S.E.I.U. Local 1000 (dba S.E.I.U. Local 1000) Statement of Operating Expenses By Activity and the Allocation of Expenses Between Chargeable, Non-Chargeable, and Member-Only Benefits Expense

Year Ended December 31, 2005

[Heading omitted in printing of remaining document pages]

Activity Code	Activity	* Total Expenses	Chargeable Expenses	Non-Chargeable Expenses	Member-Only Benefits Expense
100	Contract Proposals, Negotiations and Ratification	$ 3,638,158	$ 3,638,158		
110/114	Contract Administration, Enforcement and Grievance Adjustment	7,505,105	7,505,105		
	Representation Before Governmental Boards or Agencies:				
120	Disciplinary matters	892,003	892,003		
121	Contracting Out	173,752	173,752		
122/123	SPB: Other matters, complaints and appeals	147,807	147,807		
124/125	PERB: Unfair Labor Practices	97,488	97,488		
126/127	PERB: Other matters	7,869	7,869		
128	PERS matters	57,285	57,285		
129	State licensing board matters	4,206		$ 4,206	
130	Board of control matters	-			
131	Unemployment Ins./ Workers Comp.	-			
132	Discrimination matters	125,442	125,442		
133	U.S. Dept. of Labor: FLSA matters	2,522		2,522	
135	Other state agency or board matters	6,620		6,620	
	Litigation:				
140	Contracting Out litigation	10,736	10,736		
141	Discrimination litigation	1,734	1,734		
142	Other litigation on behalf of Local represented employees or the Local which involves wages, hours, benefits, working conditions or other employee rights	- 92,702	- 92,702		
143	Fair Share Fee litigation and arbitration	45,646	45,646		
144	Other litigation which does not involve the wages, hours, benefits, working conditions or other employee rights of Local-represented employees	80,928		80,928	
150	Conferences, discussion or background reading concerning wages, hours, employee rights, representational skills, etc.	419,605	419,605		
170	Organization in new units	1,051		1,051	
180	Membership Recruitment	63,519		63,519	
190	Political Education	(2,551)		(2,551)	
200	Community Service/Charitable Activities	76,627		76,627	
210	Other Activity (Job Related)	81,554	81,554		
211	Other Activity (Non-Job Related)	3,523		3,523	

The accompanying notes are an integral part of this statement

E. Activity Code	Activity	Total Expenses	Chargeable Expenses	Non-Chargeable Expenses	Member-Only Benefits Expense
220-226	Political Activity and Local 1000 PAC				
215-218	Activities	2,[illegible],196	318,[illegible]	1,861,[illegible]	
	Communications:				
230	Bargaining unit and corporate publications	481,942	386,855	95,087	
231	Newsline, leadership letters, and other communiqués	219,088	175,862	43,226	
232	Public and media relations	211,213	169,541	41,672	
233	Other publications (Job Related)	104,790	84,115	20,675	
234	Other publications (Non-Job Related)	10,048		10,048	
235	Website	78,198	62,770	15,428	
	Legislative:				
240	Introduced, supported and opposed legislation	82,144	82,144		
242	Budgetary legislation	36,484	36,484		
243	Screening and watching legislation	74,473		74,473	
244	Legislative activities not tied to particular legislation	80,573		80,573	
	Meetings and Governance:				
250	General Council	1,253,596	1,253,596		
251	Board and officer meetings and activities	542,292	542,292		
252	Corporate and BUC meetings and activities	2,586,280	2,586,280		
253	Committee meetings - general subject matter	6,610	6,610		
254	DLC/Region meetings, administration and leadership training	1,081,671	863,427	218,244	$ 81,234
255	Internal disputes and election protests	36,620	36,620		
256/257	SEIU and other labor affiliate meetings and activities	7,148,175	1,037,426	6,110,749	2,736
258	Other meetings or activities regarding Local governance	114,139	114,139		
	Staff and Local Administrative Activities:				
260	General administration	1,872,312	1,692,208	180,104	9,062
261	Accounting/Financial management	1,573,774	1,414,823	158,951	7,869
262	Fair Share Fee administration	46,651	46,651		
263	Other administrative expenses office and equipment services	2,596,714	2,334,446	262,268	12,981
	(1) Member-Only Benefits		-		
270	Member death benefits	156,576		156,576	156,576
271/282	Member-only insurance benefits	70,943		70,943	70,943
290	Fight Back Fund Expense	3,726,368	1,019,065	2,707,303	
	Total operating expenses	$40,045,409	$27,552,746	$12,492,663	$341,704
		100.00%	68.80%	31.20%	0.85%

The accompanying notes are an integral part of this statement

[5]Union of California State Workers S.E.I.U. Local 1000 (dba S.E.I.U. Local 1000) Notes to Statement of Operating Expenses by Activity and the Allocation of Expenses between Chargeable, Non-Chargeable and Member-Only Benefits Expense

Year Ended December 31, 2005

[Heading omitted in printing of remaining document pages]

Note 1-Summary of Significant Accounting Policies:

a. Nature and Purpose of the Local

The purpose of the Union of California State Workers S.E.I.U. Local 1000 (the Local) is to represent employees and retired employees of the State of California in the following matters: salary, benefits and working conditions, assistance in filing and pursuing employee grievances, legal representation on both an individual and class basis, technical assistance in matters of job classification, and legislative advocacy in support of programs beneficial to state employees and retirees.

The Local represents State of California Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20 and 21.

b. Affiliation

On January 23, 2004, the Local entered into an affiliation agreement with the Service Employees' International Union. The Local has been designated as "Union of California State Workers Local 1000, SEIU". The Local pays per capita taxes to SEIU International.

The Local is also affiliated with the California State Employees Association (the Association). The Local reimburses the Association for its allocated share of Central Support costs.

c. Basis of Presentation

The accompanying statement was prepared for the purpose of determining the fair share cost of services rendered by the Local for employees represented by, but not members of, the Local. The accompanying statement is not intended to be a complete presentation of the Local's financial position, changes in its net assets, or its cash flows in accordance with accounting principles generally accepted in the United States.

d. Basis of Accounting

The books of account and the financial statements of the Local reflect the accrual basis of accounting in accordance with accounting principles generally accepted in the United States. The expenses detailed herein are from general operating net assets and do not include expenses from separate segregated net assets.

[6]e. Property and Equipment

Depreciation expense is computed using the straight-line method over the estimated useful life of the assets ranging from three to fifteen years.

f. Federal and State Income Taxes

The Local is organized pursuant to the General Non-Profit Law of the State of California and is exempt from State and

Federal income taxes under I.R.C. 501(c)(5) and California Revenue and Taxation Code Section 23701a.

g. Estimates

The preparation of financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions that affect certain reported amounts and disclosures. Accordingly, actual results could differ from those estimates.

h. Background - Non-Member Fees

In 1986, the United States Supreme Court issued a decision regarding certain procedures that must be followed by a local union that is collecting fair share fees from nonmembers under a collective bargaining agreement with a public employer. In Chicago Teachers Union vs. Hudson, the United States Supreme Court reaffirmed the constitutionality of such fair share fee agreements, originally upheld in Abood vs. Detroit Board of Education. In another earlier case, Ellis v. Railway Clerks, the United States Supreme Court had held that certain union expenditures could be charged to fair share fee payers, but that certain others could not be charged.

In 1988, the United States Supreme Court issued a decision holding that unions covered under the National Labor Relations Act (NLRA) may not charge non-members fees for nonrepresentational activities when the non-members are covered by collective bargaining agreements and object to such fees for nonrepresentational activities. This decision, known as Communication Workers of America vs. Beck, applies to the standard union shop, where the board and courts have long held that any bargaining unit employee may opt to be classified as a "financial core status employee" if he/she does not wish to join the union.

[7]Note 2- **Definitions:**

This statement sets forth the Local's activities and the expenditures associated with each activity. The numbering of each activity is from a coding system used by the Local to keep track of the time and expenses associated with each activity. Following each activity is a brief description of the nature of that activity and the type of expenditures included. These activities are grouped into three categories for this report: a) those activities determined by the Local to be fully chargeable for all fee payers, b) those activities determined by the Local to be entirely non-chargeable to objecting fee payers, c) those activities determined by the Local to be partly chargeable and partly non-chargeable to fee payers.

a. Chargeable Expenses

100 Contract Proposals, Negotiations and Ratification

This activity encompasses the development, presentation and ratification by employees of contract proposals. Such activity includes formulation of bargaining goals, priorities and proposals, together with related research and drafting of supporting arguments; Bargaining Unit Council and other meetings devoted to discussion of contract proposals, negotiations or ratification; the process of receiving input from bargaining unit employees through surveys, worksite meetings or other means regarding matters to be negotiated, including worksite committee development and meetings in support of bargaining; education, research and training related to contract proposals, negotiations, or ratification, including training and orientation of Bargaining Unit Council members; negotiation of contracts; participation in any impasse procedures related to contract negotiations (i.e., fact finding, mediation or arbitration); ratification by the bargaining units; preparation and distribution of material such as flyers, draft contracts, reports and other publicity work (both within and outside the Local, including public and media relations) regarding the status of contract proposals, negotiations and ratification; distribution of leaflets; demonstrations and job actions related to contract proposals, negotiations and ratification; and litigation arising out of activities in support of the Local's position on contract proposals, negotiations or ratification.

[8]*110/114 Contract Administration, Enforcement and Grievance Adjustment*

Activities that relate to administration and enforcement of the contract once negotiated include all aspects of handling grievances or arbitrations under the contract, including preparation, participation and follow-up, internal Local arbitration appeals, and any appeals or other proceeding (including court litigation) involving enforcement of the contract; all aspects of the job steward program, including steward training supervision, activities and meetings; providing information to employees through worksite meetings, mailers or otherwise about their rights under the contract, the grievance arbitration process, and problems or questions about contract administration issues; handling employees' questions and complaints on contracts rights, grievances and other contract administration issues; meetings, phone calls and correspondence with representatives of the State employer to discuss the interpretation of the contract generally or to discuss particular grievances or problems under the contract; BUC and other meetings devoted to discussion of problems relating to administration or implementation of the contract; and education, research and training related to grievance handling and other aspects of contract administration.

120 Disciplinary Matters
Representation of employees in disciplinary matters arising in the course of their employment.

121 / 140 Contracting Out / Contracting Our Litigation
Action by Local representatives to prevent the State of California from eliminating or reducing state jobs in Local-represented units by entering into contracts with private employers for services available through state government employees.

122 / 123 SPB: Other Matters, Complaints and Appeals
Representation of employees before the State Personnel Board on such matters as examination appeals, classification disputes, appeals regarding voided appointments, and other merit-related appeals.

124 / 125 PERB: Unfair Labor Practices
The pursuit and defense of unfair labor practice charges before the Public Employment Relations Board (PERB) that arise from alleged violation of such matters as defined in statute.

126 / 127 PERB: Other Matters
Representation before PERB on such matters as petitions regarding the composition of units, unit modification or severance proposals, election challenges and injunctive relief.

[9]*128 PERS Matters*
Representation before the Public Employees Retirement System regarding health and welfare plans of state employees and on matters related to the funding of current and future retirement benefits.

132/141 Discrimination Matters Discrimination Litigation
Representation of employees charging work-related discrimination.

142 Other Litigation on Behalf of Local-Represented Employees or the Local Which Involves Wages, Hours, Benefits, Working Conditions or Other Employee Rights
This activity includes litigation on matters such as the prevention of transfers of funds from the Public Employees Retirement System to the State of California general operating account. This litigation also involves representation of individual unit members before courts of competent jurisdiction in defense of their wages, hours and working conditions, in instances where informal or administrative remedies are unavailable or have been exhausted.

143 Fair Share Fee Litigation and Arbitration
This activity includes litigation regarding challenges to the Local's right to collect fees, and annual arbitrations regarding the amount of the fees the Local charges to fee payers who have filed objections to

paying for any activities not germane to collective bargaining.

150 Conferences, Discussion or Background Reading Concerning Wages, Hours, Employee Rights, Representational Skills, etc.

This activity includes all readings, meetings, conferences, or other activities not covered by another activity which provide background information or education as opposed to research on or development of specific proposals related to wages, hours, benefits, working conditions, employee rights, industry developments in public sector employment or labor relations, representational skills, or other matters pertinent to improving the working lives of Local-represented employees. This activity also includes general professional reading by staff, and the purchase and maintenance of publications used in such representation, such as the research and law libraries.

210 Other Activity (Job Related)

This is a miscellaneous category that is used only in the rare case when none of the other more descriptive categories apply to an activity involving wages, hours, benefits, working conditions, employee rights or other matters pertinent to improving the working lives of Local-represented employees.

[10]*240 Introduced, Supported and Opposed Litigation*

Research, analysis, writing, meetings, testimony or other legislative advocacy regarding legislation introduced, supported or opposed by the Local which relates to the wages, hours, benefits, working conditions, bargaining rights or other employee rights of all or some groups of Local-represented employees. Examples include legislation on contracting out, statutory rights of Local-represented employees, employees health and safety matters, and revisions to the bargaining process under HEERA.

242 Budgetary Legislation

Research analysis, writing, meetings, testimony or other legislative advocacy regarding budgetary legislation. Other legislative expenditures are in activities 240, 243 and 244.

250 General Council

Every two years, delegates from the Association's affiliates (including the Local), plus ex-officio delegates, meet as a General Council to elect statewide officers for the next two years, adopt budgets and consider resolutions regarding the Association's governance, goals, objectives and procedures.

251 Board and Officer Meetings and Activities

All aspects of preparation for, participation in and follow-up to Association Board of Directors and officer elections, meetings and other activities not concerned with a single subject matter covered by another activity.

252 Corporate and BUC Meetings and Activities

All aspects of preparation for, participation in and follow-up to Corporate and Bargaining Unit Council elections, meetings and other activities not concerned with a single subject matter covered by another activity.

253 Committee Meetings - General Subject Matter

All aspects of preparation for, participation in and follow-up to meetings of standing or ad hoc committees of the Board of Directors or of the Local that involve a general subject matter not covered by another activity and are concerned with wages, hours, benefits, working conditions or other employee rights of Local-represented employees.

255 Internal Disputes and Election Protests

Resolution of internal disputes, grievances and election protests, including costs of the Hearing Officers Panel.

[11]*258 Other Meetings or Activities Regarding Local Governance*

Meetings or activities related to Local governance that are not covered by other activities. This includes preparation for and participation in the follow-up to meetings of committees such as Bylaws, Policies and Procedures, and Operations; legal advice or other work regarding the Local's corporate status, bylaws and other governance matters; and meetings of Local-represented employees with Local board members, officers or other Local officials that are not on a specific subject covered by another activity.

262 Fair Share Fee Administration

b. Non-Chargeable Expenses

129 State Licensing Board Matters

130 Board of Control Matters

131 Unemployment Insurance/Workers Compensation

134/135/136 Other Federal or State Agency or Board Matters

Advice, consultation and inquiry of agencies on employment-related matters not covered in other activities.

144 Other Litigation Which Does Not Involve the Wages, Hours, Benefits, Working Conditions or Other Employee Rights of Local-Represented Employees

Litigation not chargeable to fee payers.

170 Organizing New Units

180 Membership Recruitment

All activities to obtain new members in bargaining units or divisions that are currently represented by the Local, including the cost of meetings held principally for that purpose as well as the costs of recruitment material.

190 Political Education
Costs related to education of members on political matters not chargeable to fee payers.

200 Community Service / Charitable Activities
Contributions or activities (i.e., benefit events or Local-sponsored volunteer activity) on behalf of community or charitable organizations.

[12]*211 Other Activity (Non-Job Related)*
This is a miscellaneous category used only when none of the other more descriptive categories apply to an activity which affects the lives of Local-represented employees more as general citizens than as employees, because it did not involve their wages, hours, benefits, working conditions, employee rights or other matters pertinent to improving their work lives. Examples of these activities are participation in strike activity by other unions not directly involving Local-represented employees, and participation as a Local representative in meetings or conferences of organizations having no relationship to the wages, hours, benefits, working conditions, development in public sector employment, labor relations, representational skills or other matters pertinent to the working lives of Local-represented employees.

234 Other Publications (Non-Job Related)

243 Screening and Watching Legislation
Initial screening and analysis of legislation to determine whether the Local will take a position on it, and continued monitoring of legislation on which the Local has taken a "watch" position.

244 Legislative Activities Not Tied to Particular Legislation
Legislative meetings or contracts not concerned with particular legislation, but undertaken for the purpose of enhancing the Local's general effectiveness in the Legislature. Any meetings involving political action activities or support of particular legislators are included in activities 220-226 and 245-248.

270 Member Death Benefits
All costs of providing, promoting and administering the Local's member death benefits program.

271 / 282 Member-Only Insurance Benefits
The Local provides numerous opportunities for members to participate in insurance programs. The cost of plan administration is reimbursed by insurance carriers.

[13]c. Partially Chargeable/Non-Chargeable (Allocation methodology Note 3a)
220-226, 245-248 Political Activity and the Local 1000 PAC Activities
This category of expenditure reflects the Local's participation in political activity, including management of the Political

Action Fund, a separate fund not included in the general fund account. This Fund is financed by a portion of dues and fees set by the Local's Board of Directors. Members and fee payers who inform the Local in writing that they do not wish to make such contributions to the Fund are not required to do so. Uses of this Fund include contributions to selected political candidates for California state office and to support or oppose ballot measures and initiatives. Other political activity of the Local includes the coordination of volunteer work on behalf of any political organization or candidate for political office as well as research, analysis, writing, meetings, financial contributions and other advocacy regarding ballot initiatives supported or opposed by the Local.

This category consists mainly of contributions to ballot measure committees and a general purpose campaign committee whose purpose was to take positions on initiatives including opposing certain propositions. Proposition 76 was considered chargeable to fee payers while Proposition 75 and all other propositions were considered non-chargeable to fee payers.

230 Bargaining Unit Publications

231 Newsline, Leadership Letters and Other Communiqués

This activity includes all costs associated with leadership letters and any other reports or communiqués of a general nature concerning a variety of subject matters which are directed at Local-represented employees or leadership.

232/236 Public and Media Relations, Website
This activity includes all costs of the Local's media relations and public relations activities (including such matters as the distribution of leaflets, website maintenance, demonstrations, speeches, advertisements and press releases directed toward members of the general public) on matters not devoted to contract proposals, negotiations, ratification, or Local 1000 PAC or other political activities.

233 Other Publications (Job Related)
This activity includes the production of publications (i.e., reports, brochures or handbooks – whether on a single subject or multiple subjects) that concern the wages, hours, benefits, working conditions or other employee rights of Local-represented employees, but do not relate to a single subject matter covered by one of the other activities.

[14]*254 DLC/Region Meetings, Administration and Leadership Training*
The Local has District Labor Councils (DLCs) throughout the state that receive a portion of the Local's dues revenue for funding of state employee representation at the local level. Typical activities of the DLCs include newsletters to inform

employees of Local decisions at committee and Board meetings, preparation of proposals for bargaining, preparation for the ratification decision, creation of job steward committees and social gatherings. This activity includes the cost of all DLC and region meetings, the administration of DLCs (including monthly dues allocations) and the regions, and training of DLC and regional officers.

256/257 SEIU and Other Labor Affiliate Meetings and Activities
The Local participates in meetings and activities of its international affiliate, the Service Employees International Union (SEIU), and other regional labor organizations affiliated with the SEIU (e.g., the SEIU State Council), with which the Local is also affiliated. This activity includes the cost of affiliation fees, which are used on a variety of activities including research and staff assistance to local affiliates such as the Local on bargaining, contract enforcement, field representation, organizing, and union governance. The SEIU also uses these fees for numerous other activities and expenditures such as its affiliation fees to the AFL-CIO, political activities, organizing, publications and administrative expenses.

260 General Administration
Includes staff meetings, discussion and staff memoranda of a general nature, including staff personnel matters, staff

training (to the extent not on a single subject covered by another activity), and typical administrative matters such as opening mail.

261 Accounting / Financial Management
Administration of the Local's financial affairs, including budgeting, cost analysis, planning and control, computer systems development, accounting, payroll, record keeping and data processing.

263 Other Administrative Expenses / Office and Equipment Services
Other administrative meetings not covered in activities 260-262, including expenses related to the provision of office space, office supplies, corporate insurance, the switchboard, in-house mail delivery and messengers; legal representation (including litigation) regarding the Local's leases, contracts and other obligations with respect to third parties; dealings with the State Employees Building Corporation; the purchase, assignment and maintenance of vehicles and other equipment, and any other office or equipment matters.

[15]*999 Fight Rack Fund Expense*
This fund was established under a temporary dues assessment and is used to account for expenses for specific initiatives and other political issues related to the terms and conditions of employment of members and feepayers or the preservation of bargaining unit work.

Note 3 - Significant Factors and Assumptions Used in the Allocation of Direct and Indirect Divisional Expenses for the Computation of Chargeable and Non-Chargeable Expenditures:

a. Allocation - Specific Activity Codes

230, 231, 232, 233, 236 Publications, Letters. Communiqués, & Public Relations

Based upon a review of the content of publications produced within these activity codes, an allowance of 19.73% of the Local's costs are non-chargeable to reflect the portion of the publications pertaining to activities that would not be chargeable to objecting fee payers.

254 DLC/Region Meetings, Administration & Leadership Training

The financial information of the Local's DLCs has been audited by an external Certified Public Accountant. All expenditures allocated to these DLCs have been classified as chargeable and non-chargeable based on these audits. The expenditures of any DLCs that were not audited were classified as non-chargeable to objecting fee payers.

999 Fight Back Fund Expense

The Local separately accounts for all Fight Back Fund Expenses. All expenses included were specifically identified and determined to be chargeable or non-chargeable to the fee payer based on the nature of the expense. They mainly consist of campaign related expense for Proposition 75 (nonchargeable) and Proposition 76 (chargeable) as well as litigation regarding the Fight Back Fund (chargeable) and collective bargaining related Activities (chargeable). A separate audit of the Fight Back Fund expenditures has been prepared.

[16]b. Allocation-Specific Activity Codes
256/257 SEIU and Other Labor Affiliate Meetings and Activities

A portion of the Local's affiliation expenditures is considered to be non-chargeable to reflect the portions of the SEIU International's expenditures and expenditures paid to other affiliated groups that may be considered to be non-chargeable to objecting fee payers. Based upon an analysis prepared by the SEIU and audited by a Certified Public Accountant, it was concluded that 77.74% of the SEIU International's expenditures were not chargeable to objecting fee payers. The Local has applied the same 77.74% to its SEIU International expenditures.

Other affiliated group expenditures are not audited by a Certified Public Accountant and are therefore considered non-chargeable to objecting fee payers.

Expenditures	Total Expenses	Chargeable Expenses	Non-Chargeable Expenses	Member-Only Benefits Expenses
SEIU International	$ 4,660,435	$ 1,037,426	$ 3,623,009	$ 2,736
Other affiliated groups	2,487,740		2,487,740	
	$ 7,148,175	$ 1,037,426	$ 6,110,749	$ 2,736

260, 261, 263 General Administration, Accounting and Administrative Expense **General administration, accounting and administrative expenses are primarily allocated based on the ratio of the combined total of chargeable, non-chargeable and member-only benefits expenses for all other activity codes which require administrative attention.**

[17]Note 4 - Reconciliation of Total Expense to Audited Financial Statement Expenses

Total Expenses included on page 4	$ 40,045,049
Expenses included in this report, but netted against revenue in audited financial statement:	
Chapter Administration	(727.102)
Chapter forfeits (net of grants)	80,570
Dues deduction processing fee	(122,573)
Financial statement revenue, netted against expenses included in this report	
Affiliate rebates	8,509,845
Other income	3,369
Revenue credited to Local 1000 in the Central Support billing	(123,326)
Audited Financial Statement Expenses	$ 47.666,212

[18]HOOD & STRONG LLP
[Logo omitted in printing]

Independent Auditors' Report

THE 1000 COUNCIL
UNION OF CALIFORNIA STATE WORKERS
S.E.I.U. LOCAL 1000 (dba S.E.I.U. Local 1000)
Sacramento, California

We have audited the accompanying Statement of Identified Expenses and the Allocation Between Chargeable and Non-Chargeable Expenses (the Financial Statement) for the UNION OF CALIFORNIA STATE WORKERS S.E.I.U. LOCAL 1000 (dba S.E.I.U. Local 1000) Special Assessment Fund (the Fund) for the period from inception on September 1, 2005 through December 31, 2005. This statement is the responsibility of the Local's management. Our responsibility is to express an opinion on this statement based on our audit.

We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statement is free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statement. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audit provides a reasonable basis for our opinion.

The total identified expenses reflected in the Financial Statement are based on the identified expenses of the Fund for the period from inception on September 1, 2005 through December 31, 2005, with regard to the accounting policies based in Note 1. The allocation of identified expenses between chargeable and non-chargeable expenses is based on the definitions and significant factors and assumptions described in Note 2. The accompanying statement is not intended to be a complete presentation of the financial statements of Union of California State Workers S.E.I.U. Local 1000.

In our opinion, the Financial Statement presents fairly, in all material respects, the identified expenses of the Fund for the period from inception on September 1, 2005 through December 31, 2005 and the allocation of identified expenses between chargeable and non-chargeable expenses, on the basis of the definitions and significant factors and assumptions described in Note 2, on the basis of accounting as discussed in Note 1.

This report is intended solely for the information and use of the Union of California State Workers S.E.I.U. Local 1000 and its agency fee payers and is not intended to be and should not be used by anyone other than these specified parties.

/s/ Hood & Strong LLP

April 21, 2006

[19]Union of California State Workers S.E.I.U. Local 1000 (dba S.E.I.U. Local 1000) Special Assessment Fund

Statement of Identified Expenses and the Allocation of Identified Expenses Between Chargeable, and Non-Chargeable Expenses

For the Period from Inception on September 1, 2005 through December 31, 2005

	Identified Cash Disbursements		
	Total	Chargeable	Non-Chargeable
Salaries and Wages			
Staff and Management Salaries	$ 358,175	$ 179,087	$ 179,087
Overtime Labor	11,085	5,542	5,543
Health Insurance Waiver	750	375	375
Union Business Leave	24,420	12,210	12,210
Campaign Expenses			
Member Travel and Campaign Expenses	117,136	58,568	58,568
Staff Travel	10,080	5,040	5,040
Division Officer Activity	521	260	261
Division Council Meeting	15,039	7,519	7,520
Bargaining Activity Meeting	8,428	4,214	4,214
Fringe Benefit Contributions and Employment Taxes	89,582	44,791	44,791
Supplies and Materials			
Miscellaneous Office Equipment	5,775	2,887	2,888
Operating Expenses and Services			
Legal	26,289	26,289	-
Survey	32,500	26,000	6,500
Computer Services	60		60
Printing Labor	47,228	13,008	34,220
Printing Labels	1,834	680	1,154
Printing Postage	1,157		1,157
Printing Supplies	34,001	10,186	23,815
Political Action Fund	2,560,000	622,350	1,937,650
Donations	382,249		382,249
	$ 3,726,309	$ 1,019,006	$ 2,707,303
Percentages		27.35%	72.65%

The accompanying notes are an integral part of this statement.

[20]Union of California State Workers S.E.I.U. Local 1000 (dba S.E.I.U. Local 1000)

Notes to Statement of Identified Expenses and the Allocation between Chargeable and Non-Chargeable Expense

Note 1 - Summary of Significant Accounting Policies:

a. Nature and Purpose of the Local

The purpose of the Union of California State Workers S.E.I.U. Local 1000 (the Local) is to represent employees and retired employees of the State of California in the following matters: salary, benefits and working conditions, assistance in filing and pursuing employee grievances, legal representation on both an individual and class basis, technical assistance in matters of job classification, and legislative advocacy in support of programs beneficial to state employees and retirees.

The Local represents State of California Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20 and 21.

This statement sets forth the Local's expenditures associated with the "Fight Back" fund. This fund was established under a temporary dues and fees assessment and is used to account for expenses for specific initiatives and other political campaigns and issues related to the terms and conditions of employment of members and fee payers and the preservation of bargaining unit work.

b. Affiliation

On January 23, 2004, the Local entered into an affiliation agreement with the Service Employees International Union. The Local has been designated as "Union of California State Workers Local 1000, SEIU." The Local pays per capita taxes to SEIU International.

The Local is also affiliated with the California State Employees Association (the Association). The Local reimburses the Association for its allocated share of Central Support costs.

c. Basis of Presentation

The accompanying statement was prepared for the purpose of determining the fair share cost of services rendered by the Local for employees represented by, but not members of, the Local and only relates to the identified expenses included in the special assessment "Fight Back" fund. The accompanying statement is not intended to be a complete presentation of the Local's financial position, changes in its net assets, or its cash flows in accordance with accounting principles generally accepted in the United States.

[21]d. Basis of Accounting

The books of account and the financial statements of the Local reflect the accrual basis of accounting in accordance with accounting principles generally accepted in the United States. The expenses detailed herein are from the special assessment "Fight Back" fund, and does not included expenses from separate segregated net assets or general operating net assets.

e. Property and Equipment

Depreciation expense is computed using the straight-line method over the estimated useful life of the assets ranging from three to fifteen years.

f. Federal and State Income Taxes

The Local is organized pursuant to the General Non-Profit Law of the State of California and is exempt from State and Federal income taxes under I.R.C. 501(c)(5) and California Revenue and Taxation Code Section 23701a.

g. Estimates

The preparation of financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions that affect certain reported amounts and disclosures. Accordingly, actual results could differ from those estimates.

h. Background - Non-Member Fees

In 1986, the United States Supreme Court issued a decision regarding certain procedures that must be followed by a local union that is collecting fair share fees from non-members under a collective bargaining agreement with a public employer. In Chicago Teachers Union vs. Hudson, the United States Supreme Court reaffirmed the constitutionality of such fair share fee agreements, originally upheld in Abood vs. Detroit Board of Education. In another earlier case, Ellis v. Railway Clerks, the United States Supreme Court had held that certain union expenditures could be charged to fair share fee payers, but that certain others could not be charged.

In 1988, the United States Supreme Court issued a decision holding that unions covered under the National Labor Relations Act (NLRA) may not charge non-members fees for nonrepresentational activities when the non-members are covered by collective bargaining agreements and object to such fees for non-representational activities. This decision, known as Communication Workers of America vs. Beck, applies to the standard union shop, where the board and courts have long held that any bargaining unit employee may opt to be classified as a "financial core status employee" if he/she does not wish to join the union.

[22]**Note 2- Summary of Significant Allocation Assumptions:**

The significant allocation assumptions made by the Union are as follows:

a. General Assumptions Used for All Categories

Based upon the opinion of the Local's management and after consultation with the Local's legal counsel, the following assumptions are used to allocate the categories listed below.

Proposition 76 – Chargeable to fee payers

Proposition 75 and all other propositions on the November 2005 ballot – Nonchargeable to fee payers

General campaign expense – 50% Proposition 75, 50% Proposition 76

The Union's campaign on Proposition 75 and 76 during this time had a dual focus on both initiatives and activities arising out of the campaign had the primary objective of targeting both initiatives.

b. Salaries and Wages
Based upon the nature of the campaign during this time and dual objective of the activities, salaries and wages are allocated based on the assumption that 50% of the employee's time would have been spent working on Proposition 75 and 50% of the time would have been spent working on Proposition 76.

c. Union Business Leave
Union business leave is allocated based on the same allocation as salaries and wages.

d. Campaign Expenses
Travel is allocated based on the same allocation as salaries and wages with the exception of campaign expenses. Campaign expenses were specifically identified and determined to be char-

geable or nonchargeable based on the general assumptions above.

e. Fringe Benefit Contributions and Employment Taxes
Benefits and employment taxes are allocated based on the same allocation as salaries and wages.

f. Supplies and Materials
Supplies and materials were considered a general campaign expense and were allocated 50%/50% between chargeable and nonchargeable.

[23]g. Operating Expenses and Services
Generally, operating expenses were determined to be chargeable or nonchargeable, based upon review of the nature of the expenditure. Expenditures for litigation were determined to be 100% chargeable as they relate to defense of the Fight Back Fund after consulation with legal counsel. However, a phone survey expense of $32,500 was determined to be 80% chargeable since 80% of the questions related to collective bargaining related matters or the preservation of bargaining unit work. Political action fund expenses were specifically identified and determined to be chargeable or nonchargeable based on the general assumptions above. Donations were specifically identified and determined nonchargeable based on the general assumptions above.

Note 3- **Explanation of Certain Line Items:**

Most line item descriptions are self-explanatory. However, the following additional explanations are provided:

a. Health Insurance Waiver

Compensation for employees who waive employer-provided health coverage because coverage is provided by a spouse.

b. Member Travel and Campaign Expenses

This category of campaign expenses includes expenditures for consultants, promotional items and telephone usage. Member travel includes expenses for member meetings.

c. *Political Action Fund*

This category consists mainly of contributions to ballot measure committees and a general purpose campaign committee whose purpose was to take positions on initiatives including opposing Proposition 75 and Proposition 76.

d. Donations

This consisted of in-kind printing services contributed to political parties and/or committees (nonchargeable).

[24]TOAL & GRIFFITH, LLC
CERTIFIED PUBLIC ACCOUNTS

200 Harry S. Truman Parkway, Ste. 100
Annapolis, Maryland 21401
Voice: (410) 224-0343, Facsimile: (410) 224-0043

Independent Auditor's Report

The Executive Board of the
Service Employees International Union, CLC

We have audited the accompanying consolidated statement of expenses and allocation between chargeable and non-chargeable expenses alternative basis of allocation of the Service Employees International Union, CLC-United States Division (the International Union) for the year ended December 31, 2004. This consolidated statement is the responsibility of the International Union's management. Our responsibility is to express an opinion on this consolidated statement based on our audit. We did not audit the total expenses reflected in Column A of the consolidated financial statements. Total expenses were audited by other auditors whose report has been furnished to us, and our opinion, insofar as it relates to the amounts in Column A, is based solely on the report of the other auditors.

We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the consolidated statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the statement. An audit also includes assessing the accounting principles used and significant estimates made by the International Union's management, as well as evaluating the overall presentation of the consolidated statement. We believe that our audit provides a reasonable basis for our opinion.

The total expense reflected in Column A of the consolidated statement agree to the expenses in the audited consolidated financial statement of the International Union for the year ended December 31, 2004, as modified to remove from expenses the per capita tax rebates paid to local unions of $10,330,490, political expenses paid from voluntary contributions of $10,107,640, expenses associated with the Eastern and Western Conferences amounting to $832,246, which were paid from funds transferred upon the dissolution of the Eastern and Western Conference affiliates, expenses paid from the Legal Defense Fund of $57,063 and SEIU Communications Center, Inc., expenses totaling $739,893. The allocation of expenses between chargeable (Column B) and nonchargeable (Column C) is based on the definitions and significant factors and assumptions described in Notes 2 and 3.

In our opinion, the consolidated statement referred to above present fairly, in all material respects, the consolidated expenses of the Service Employees International Union, CLC-United States Division for the year ended December 31, 2004, modified as discussed in the preceding paragraph and the allocated consolidated expenses between chargeable and nonchargeable expenses, on the basis of the definitions and significant factors and assumptions described in Notes 2 and 3.

This report is intended solely for the information and use of the Service Employees International Union, CLC and its agency fee payers and is not intended to be and should not be used by anyone other than those specified parties.

/s/
Toal & Griffith, LLC
June 29, 2005

[25]SERVICE EMPLOYEES INTERNATIONAL UNION, CLC UNITED STATES DIVISION

CONSOLIDATED STATEMENT OF EXPENSE AND ALLOCATION BETWEEN CHARGEABLE EXPENSES AND NON-CHARGEABLE EXPENSES ALTERNATIVE BASIS OF ALLOCATION

YEAR ENDED DECEMBER 31, 2004

	Column A	Column B	Column C	
	Total Expenses	Chargeable Expenses	Non-Chargeable Expenses	Notes
GENERAL FUND				
Personnel Costs				
Organizing	$25,574,883	$ -	$25,574,883	3a
Field Operations and Campaign Support	12,808,134	9,901,006	2,907,128	3a
Politics, Government and Community	3,798,915	-	3,798,915	3a
Union communications	5,987,344	1,613,604	4,373,740	3a
Leader Support	7,344,563	6,524,602	819,961	3a
Administrative and Financial Services	6,084,131	4,248,267	1,835,864	3a
Professional Fees and Expenses	9,532,179	4,893,288	4,638,891	3b
Administrative Expenses	17,583,088	6,027,483	11,555,605	3c
Contributions	1,543,761	-	1,543,761	3d
Payments to Locals				
Subsidies	5,482,560	-	5,482,560	3e
Per Capita Tax Rebates	10,330,490	10,330,490	-	3e
Reimbursements	1,604,468	1,604,468	-	3e
Political Subsidies	1,922,861	-	1,922,861	3f
Conferences and Meetings	1,951,056	485,934	1,465,122	3g
Communications and Media	673,184	181,692	491,492	3h
Affiliation Fees and Adjustments	10,206,662	-	10,206,662	3i
Death Gratuities	136,250	-	136,250	3j
Building Expenses	1,185,649	406,440	779,209	3k
State Council Return	1,558,736	1,558,736	-	3l
Total General Fund	127,308,954	47,776,010	79,532,944	

STRIKE AND DEFENSE FUNDS	2,965,217	2,965,217	-	3m
POLITICAL EDUCATION AND ACTION FUNDS	42,165,228	-	42,165,558	3n
COMMITTEE ON POLITICAL EDUCATION	10,107,640	-	10,107,640	3n
UNITY FUND	58,730,263	-	58,730,263	3o
CONVENTION FUND	11,245,759	11,245,759	-	3p
LEGAL DEFENSE FUND	57,063	-	57,063	3q
CONFERENCE FUND EXPENSES	832,246	832,246	-	3r
SEIU COMMUNICATIONS CENTER INC.	739,893	739,893	-	3s
Total Expenses Before Modification	254,152,263	63,559,125	190,593,158	
LESS				
Per Capita Tax Rebate Payments to Locals	(10,330,490)	(10,330,490)	-	
Political Expenses Paid from Voluntary Contributions	(10,107,640)	-	(10,107,640)	
Conference Fund Expenses	(832,246)	(832,246)	-	
Legal Defense Fund	(57,063)	-	(57,063)	
SEIU Communications Center, Inc.	(739,893)	(739,893)	-	
Total Expenses as Modified	$232,084,951	$51,656,496	$180,428,455	
	100%	22.26%	77.74%	

[26]SERVICE EMPLOYEES INTERNATIONAL UNION, CLC
UNITED STATES DIVISION

NOTES TO CONSOLIDATED STATEMENT OF EXPENSES AND ALLOCATION BETWEEN CHARGEABLE EXPENSES AND NON-CHARGEABLE EXPENSES
ALTERNATIVE BASIS OF ALLOCATION
DECEMBER 31, 2004

NOTE 1-SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

Method of Accounting

The financial statement has been prepared on the accrual basis of accounting in accordance with generally accepted accounting principles.

Basis of Presentation

The accompanying consolidated statement of expenses and allocation between chargeable and non-chargeable expenses was prepared for the purpose of determining the fair share cost of services rendered by the Service Employees International Union, CLC – United States Division (the International Union) for employees represented by, but not members of, the International Union and its affiliated local unions. This statement is not intended to be a complete presentation of the International Union's financial position, or changes in its net assets and its cash flows in accordance with generally accepted accounting principles. Under the alternative basis of allocation which has been required by certain jurisdiction, organizing expenses are to be considered to be non-chargeable

Financial Statement Presentation and Principles of Consolidation

The International Union records its transactions in various funds, each a self-balancing group of accounts. Each fund reflects only those transactions applicable to its designated functional area. The following fund designations are established by the International Union's Constitution or determined by management.

- General Fund
  Records all activity not accounted for in the other funds and includes the general operations of the International Union – U.S. Division, the operations of 1313 L Street, N. W., Inc. (1313 L Street) and 1800 Massachusetts Avenue Corporation, formed to be title holding corporations for the International Union's headquarters building. The General Fund includes the consolidated accounts of 1313 L Street and 1800 Massachusetts Avenue Corporation. All significant inter-company account balances have been eliminated in consolidation.

- Strike and Defense Funds
  Funds established to financially assist local unions and members involved in strikes. In accordance with the International Union's constitution, local unions may withdraw their per capita payments from the Strike and Defense Local Fund after one year of making per capita payments.

[notation omitted in printing]

- [27] Political Education and Action Funds (PEA)
  Records all activities for political education and political action disbursed from per capita tax allocations.

- Committee on Political Education
  Records all activities for political contributions disbursed from net assets received with donor imposed restrictions.

- Unity Fund
  The Unity Fund is a segregated fund financed from local union per capita payments that is used to finance breakthrough campaigns, coordinated bargaining, and other activities designed to increase density in SEIU's core industries. The Unity Fund is divided among the Building Service, Health Care, Long Term Care, and Public Services Divisions and a non-divisional fund.

- Convention Fund
  Records all activities for the convention of the International Union which meets every four years.

- Other Funds
  Funds established to account for assets which have been internally segregated for specific purposes as determined by the Executive Board.

Depreciation and Amortization

Depreciation and amortization of property, equipment, and improvements are computed over the estimated lives of the respective assets using the straight-line method.

Tax Status

The International Union is exempt from federal income taxes, except on net income, if any, from unrelated business activities, under Section 501(c)(5) of the Internal Revenue Code. 1313 L Street and 1800 Massachusetts Avenue Corporation are exempt from income tax, except on net income, if any, from unrelated business activities, under Section 501(c)(2) of the Internal Revenue Code.

[28]NOTE 2- DEFINITIONS

The following definitions of chargeable and non-chargeable expenses are based on existing law and the International Union's Interpretation of court cases.

a. Chargeable Expenses - Chargeable Expenses are those incurred by the International Union that reflect the share of the costs of operations of the International Union which are considered necessarily and reasonably incurred for the purpose of assisting local unions and councils in the performance of their duties as a representative of the employees in dealing with the employer on labor management issues, including the costs of:

negotiating and administering the collective bargaining contract; settling grievances and disputes by mutual agreement, or in arbitration, court or otherwise; activities and undertakings normally and reasonably employed to implement the duties of the local union or council as representative of the employees in the bargaining unit; and the maintenance of the International Union's, local unions' and councils' existence. The following are examples of expenditures classified as chargeable: preparation for and negotiations of collective bargaining agreements; contract administration including investigation and processing grievances; meetings, conferences, administrative, arbitral and court proceedings and pertinent investigation and research in connection with work-related subjects and issues; handling work-related problems of employees; and providing legal, economic, and technical expertise on behalf of employees in all work-related matters.

b. Non-Chargeable Expenses - Non-chargeable expenses are those expenses incurred by the International Union for the benefit and advancement of represented employees and their union which are not considered representational activities for non-members. Non-chargeable activities include those services that are ideological or political in nature; those that are exclusively for the benefit of full union members; and those that otherwise are not considered germane to the collective bargaining process.

Activities that are classified as non-chargeable include the following: organizing, legislative and government activities outside the limited context of contract ratification or implementation; public relations and other efforts directed towards functional activities that are not considered germane to representing non-members in the collective bargaining process; political activity expenses which include support at the Federal, state, or local level; union publications to the extent they report on non-administrative or non-representational activities; donations; affiliation fees paid to a labor organization; and the cost of benefits that are not available to non-members.

[29]NOTE 3- SIGNIFICANT FACTORS AND ASSUMPTIONS USED IN THE ALLOCATION OF CONSOLIDATED EXPENSES BETWEEN CHARGEABLE AND NON-CHARGEABLE

a. Personnel Costs - The International Union has assigned all personnel to either program, leader support, or administrative and financial services departments. Program departments implement the programs of the International Union and provide services to affiliates and local unions.

[notation omitted in printing]

Administrative and financial services departments include the following departments: Accounting, Human Resources, Information and Technology, Meetings and Convention, Member Services, and Finance and General Administration. Leader support includes the Executive Department, the Executive Board, and the Firemen and Oilers Department. Personnel costs include salaries and wages, fringe benefits, payroll taxes, and reimbursed employee expenses.

Personnel costs of the Organizing departments, Field Operations and Campaign Support departments, Politics, Government, and Community departments, Union Communications departments, Leader Support departments and the Administrative and Financial Services departments have been allocated based on determinations made by the various department heads as to the percentage of time his or her department spends on chargeable and non-chargeable activities. The personnel costs of office and clerical personnel are allocated between chargeable and non-chargeable in the same percentage as their supervisors.

b. Professional Fees and Expenses - All professional fees and expenses for outside legal counsel are considered to be chargeable or non-chargeable based on the services performed. Accounting and auditing fees and expenses are considered to be fully chargeable. Other professional fees and expenses are considered to be chargeable or non-chargeable based on the service performed by the consultant. Chargeable activities include expenses for training, speakers, and research matters. Professional fees for consulting services in connection with organizing campaigns, political activities and legislative activities are considered to be fully non-chargeable.

c. Administrative Expenses - Administrative expenses include items such as rent and utilities, office supplies and expenses, investment charges, equipment rental and maintenance, computer expenses, other taxes, depreciation and amortization, printing, postage, telephone, subscriptions, insurance, and bad debt expense. These expenses are allocated to chargeable and non-chargeable expenses based on the same ratio as personnel costs.

d. Contributions - Contributions for charitable, civic, and labor-related purposes are not directly related to the function of representation and are considered to be fully non-chargeable.

e. Payments to Locals - Payments to locals which represent subsidies for organizing are considered to be fully non-chargeable. Payments to locals which represent reimbursements for operating expenses are considered to be fully chargeable. The total expenses as reported in the audited consolidated financial statement have been modified to remove from expenses the per capita tax rebates paid to local unions.

[notation omitted in printing]

[30]f. Political Subsidies - Political subsidies are considered to be fully non-chargeable.

g. Conference and Meetings - Expenses for conferences and meetings are allocated between chargeable expenses and non-chargeable expenses based on the purpose of and topics discussed at the meetings. Items of a political, legislative, or organizing nature are considered to be non-chargeable. Educational training programs and conferences for local, state and national staff, which are to enhance skills in collective bargaining, grievance handling, and contract administration are considered to be fully chargeable since they pertain to matters which are germane to collective bargaining. Executive Board meetings and meetings which pertain to the governance of the International Union such as formulating and communicating union internal policy are considered to be fully chargeable.

h. Communications and Media - Direct printing and publishing expenses of the publications are allocated based on the specific content of articles in the publications such as the International Union's magazine, SEIU Action, which is distributed to all members and agency fee payers and the newsletter, Bold Action Fax. Expenses allocable to articles considered to be political or ideological in nature are considered non-chargeable. Expenses allocable to reporting on legislative and lobbying activities, litigation activities, illegal strike activities, organizing and articles relating to enhancement of the reputation of the International Union as a whole are considered to be non-chargeable. The content of articles deemed chargeable are directly related to issues on collective bargaining and contract administration. These articles include topics such as collective bargaining contracts negotiated by locals throughout the country. The expenses relating to the maintenance of the International Unions website have been allocated based on an assessment of the content included on the website throughout the year.

i. Affiliation Fees and Assessments - Per capita taxes and assessments paid to the AFL-CIO and affiliated labor organizations are considered to be fully non-chargeable.

j. Death Gratuities - Death gratuities are benefits paid to a deceased member's family and are considered to be fully non-chargeable.

k. Building Expenses - This category represents expenses incurred by 1313 L Street for the operation and maintenance of the International Union's headquarters building, such as utilities, real estate taxes, insurance, repairs and maintenance and other related expenses. These expenses are allocated to chargeable and non-chargeable expenses based on the same ratio as personnel costs.

[notation omitted in printing]

[31]l. Regional Conferences and Joint Council Meetings - The International Union returns a portion of per capita taxes received from the local unions to the International Union's councils for regional conferences and joint council meetings. These governance meetings are considered to be fully chargeable.

m. Strike and Defense Funds - Expenses of the strike and defense funds include financial assistance to local unions involved in legitimate strikes in addition to providing financial assistance for educational programs including newspaper advertisements, leaflets, handbills, and other media-based messages concerning contract ratification. Expenses also include local union withdrawals of their per capita tax payments. All expenses of the strike and defense funds are considered to be fully chargeable.

n. Political Education and Action Funds - Expenses incurred by the Committee on Political Education and Action Funds relate entirely to political and legislative activities and are considered to be fully non-chargeable. The total expenses as reported in the audited financial statement have been modified to remove from expenses the political expenses paid from voluntary contributions.

o. Unity Fund - Expenses of the Unity Fund include financial assistance to local unions involved in breakthrough campaigns to increase union membership. These expenses are organizing in function and are considered to be fully non-chargeable.

p. Convention Fund - Expenses for the International Union's convention are considered to be fully chargeable.

q. Legal Defense Fund - Expenses incurred by the Legal Defense Fund are removed from the total expenses, as they are paid solely from court awarded cost reimbursements from lawsuits.

r. Conference Funds - Expenses incurred within this Fund are paid from funds transferred upon the dissolution of the Eastern and Western Conferences and are accordingly removed from the total expenses.

s. SEIU Communications Center, Inc. - Expenses incurred by the Center are removed from the total expenses, as they are paid solely from the Center's earned income.

SEIU Local 1000
1108 O Street
Sacramento, CA 95814

PRESORTED FIRST
CLASS MAIL US
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PERMIT NO. 499

MEMBERSHIP
APPLICATION
ENCLOSED

[EXHIBIT C]

[SEIU logo omitted in printing]

Corrected Notice to Fair Share Fee Payers

Dear Fair Share Fee Payer:

I'm writing to you to become a member of our union, SEIU LOCAL 1000. I am surprised at how often I am told by workers who they believe they are union members because a deduction is taken from their payroll check, when in fact, they are paying a fee for services. Our records indicate that you are paying a service fee. We strongly urge you to become a member of the union.

As a member, you'll enjoy the benefits of membership not available to you as a fair share fee payer. You'll have the right to participate fully in the governance of the union including the ability to vote in elections in your District Labor Council (such as officers and stewards) or the Local (local officers, contract ratification, strike votes, etc.) You will also be eligible to utilize the benefits offered by Service Employees International Union Local 1000 and CSEA.

Benefits include the SEIU Union Plus Mortgage and Real Estate Program, Unsecured Loan Program, legal services for personal matters, the SEIU Mastercard with no annual fee and competitive rate, and several types of insurance plans. CSEA's member benefits include a wide range of insurance products, financial and legal services, discount entertainment tickets and travel services. There are many additional discounts and services provided to our members.

However, the most important benefit of membership is strength at the bargaining table when we negotiate your contract. You should be aware that the union security clause contained in your contract was negotiated and ratified by your coworkers who are members so that everyone who benefits from the collective bargaining process and our contract shares in its costs. The support of our members is what helps us win better wages, benefits and working conditions. We continue to be locked in a battle with the Governor to protect pensions, win raises, and maintain our benefits.

If you want to become a member of Local 1000, fill out the enclosed membership application and send it back to us. We will process your application and send you information on your District Labor Council, the Local, and the services and benefits to which you are entitled.

If you do not wish to join the union, however, California law permits collective bargaining agreements between the State of California and the SEIU LOCAL 1000 that authorize the State Controller to deduct a fair share fee from the salary or wages of all SEIU LOCAL 1000 nonmembers of the bargaining units for which SEIU LOCAL 1000 is the exclusive representative. The fees are remitted to SEIU LOCAL 1000 on a monthly basis and are to be used to support SEIU LOCAL 1000's work on behalf of fee payers and fellow employees with regard to their employment relations with the state. *This Corrected Notice and report are applicable for fair share fees collected by SEIU LOCAL 1000 for the period July 1, 2007 through June 30, 2008. You are receiving this Corrected Notice because the original notice contained a typographical error and was entitled, "June 2006*

Notice to Fair Share Fee Payers." The correct title should have been "June 2007 Notice to Fair Share Fee Payers." This Corrected Notice has the correct date in the title, along with the supporting financial materials. Moreover, due to the error, Local 1000 has extended the deadline by which any objections or challenges to the fair share fee must be postmarked, to July 12, 2007.

In Solidarity
/s/
Jim Hard
President Local 1000

June 2007 Notice to Fair Share Fee Payers

AMOUNT OF THE FEE

Effective July 1, 2007 through June 30, 2008, the fee will be no more than 99.3% of regular membership dues. Regular monthly membership dues are currently 1.5% of monthly gross salary and are presently capped at a maximum of **$90** per month. Dues are subject to change without further notice to fee payers.

This 0.7% reduction in the monthly fee from regular membership dues is designed to ensure, in accordance with SEIU LOCAL 1000's policy, that fee payers do not pay for the cost of providing benefits such as death benefits, group insurance plans and entertainment discount opportunities available only to SEIU LOCAL 1000 members. Provided along with this Notice is the SEIU LOCAL 1000 Audited Financial Statement for the year ended December 31, 2006, which describes the basis in SEIU LOCAL 1000's 2006 expenditures for setting the reduction at this level.

RIGHT TO OBJECT TO NON-GERMANE EXPENDITURES

SEIU LOCAL 1000 believes that, since all of its activities are undertaken for the purpose of advancing the interests of the fee payers and other employees it represents, aside from member-only benefits provided to SEIU LOCAL 1000 members, it is appropriate that all such employees should contribute to these efforts to advance their interests as employees. However, the law provides that you have a right to object to the use of any portion of your fees for what you believe are activities not germane to the collective bargaining functions of SEIU Local 1000, i.e., partisan political or ideological causes only incidentally related to the terms and conditions of employment or the provision of benefits available only to members. In furtherance of this right to object, SEIU LOCAL 1000 has adopted a policy setting forth procedures for objecting to or challenging the amount of the fee.

For purposes of understanding the SEIU LOCAL 1000 policy, SEIU LOCAL 1000's expenditures may be grouped into two general categories – those which are germane to collective bargaining and therefore by law chargeable to all feepayers, even if they object, and those which are not germane to collective bargaining and therefore not chargeable to fee payers who object. The fair share fee has been calculated based on the union's expenditures for collective bargaining, grievances and arbitrations, contract administration and representation, as well as other relevant matters affecting the terms and conditions of your employment.

This fair share fee is legal and enforceable under California law and United States Supreme Court decisions. Further, the law and contract authorizes your employer to deduct the fee from your paycheck.

The criteria for determining chargeable expenses comprising the fair share fee have been approved by the courts and include but are not limited to the following expenses:

1. Governing the union and the costs for conducting union elections
2. Gathering information in preparation for the negotiation of collective bargaining agreements.

3. Gathering information from workers concerning collective bargaining proposals.
4. Negotiating collective bargaining agreements.
5. Adjusting grievances and arbitrations pursuant to the collective bargaining agreements, as well as representing workers under civil service law or regulations.
6. Ratification of negotiated agreements.
7. Public advertising of negotiations or collective bargaining agreements, as well as on matters relating to representational interests in the collective bargaining process and contract administration.
8. Purchasing books, reports and advance sheets used in matters relating to the representational interests in the collective bargaining process and contract negotiations.
9. Paying technicians and professionals in labor law, economics, and other subjects for services used in (a) negotiating and administering collective bargaining agreements, and in (b) processing grievances and arbitrations.
10. Membership meetings and conventions, District Labor Councils and other Local meetings.
11. Expenditures for the publishing of those portions of newspapers and newsletters which concern matters of bargaining and representation.
12. Lawful impasse procedures, fact-finding, mediation, arbitration and economic action.
13. The prosecution or defense of litigation or charges before administrative agencies as to

ratification, interpretation, or enforcement of collective bargaining agreements.

14. Legislative activities undertaken with employers of members of the bargaining unit in order to enhance or protect wages, hours, and working conditions of bargaining unit members.
15. Supporting and paying affiliation fees to state and local councils to the extent that such support and fees relate to the representational interests of the union in the collective bargaining process and contract administration as permitted by law.
16. The prosecution or defense of litigation or charges to enforce rights relating to concerted activity, the duty of fair representation and collective bargaining, as well as collective bargaining agreements, and any litigation related to chargeable activities.
17. Social and recreational activities for all members of the bargaining unit, whether union members or not, designed to promote unity and cohesiveness of the bargaining unit in matters relating to wages, hours and working conditions.
18. Operating and administrative expenses, salaries and benefits apportioned to chargeable items, e.g., rent, utilities, etc.

The reduced fair share fee rate paid by objectors does not include expenses, either direct or indirect, for the following activities:

1. Partisan political campaigns, get-out-the vote and voter registration.
2. Supporting and contributing to political organizations and candidates for public office.

3. Supporting and contributing to ideological causes and committees (which include issues of foreign affairs) unrelated to terms and conditions of employment or the preservation of bargaining unit work.
4. Member-only benefits.
5. Litigation not related to bargaining unit matters, collective bargaining and representation.
6. Organizing activities in potential new chapters and internal campaigns in current chapters.

An analysis of what SEIU LOCAL 1000 has determined would have been subject to "exception" from fair share fees as expenditures not chargeable to objecting fee payers in 2006 is set forth in the SEIU LOCAL 1000 2006 Audited Financial Statement provided along with this Notice and incorporated by reference herein. This Statement itemizes and describes the major categories of expenditures by SEIU LOCAL 1000. The amounts attributed to these categories of expenditures are taken from an independent audit of SEIU LOCAL 1000's 2006 financial records contained in the Financial Statement prepared by Hood & Strong LLP, a certified public accounting firm. This Statement shows that 60.3% of the expenditures were chargeable to objecting fee payers in 2006.

Effective July 1, 2007 through June 30, 2008 (the "2007-8 Fee Payer Year"), SEIU LOCAL 1000 will charge fee payers who object to expenditures not germane to collective bargaining a fee of no more than 60.3% of regular membership dues for that salary level. In order to obtain this reduced amount, you must send an objection letter to SEIU LOCAL 1000's Member Records Unit, 1108 "O"

Street, Sacramento, CA 95814, stating that you object to any use of your fees during the 2007-8 Fee Payer Year for activities not germane to collective bargaining. Any objection letters submitted for prior Fee Payer Years are not applicable to the 2007-8 Fee Payer Year. Except for new employees hired after June 1, 2007, objection letters sent to SEIU LOCAL 1000's Member Records Unit must be postmarked no later than July 12, 2007. Fee payers hired after June 1, 2007 must send to SEIU LOCAL 1000's Member Records Unit letters of objection postmarked within *45 days of receiving their notice of being subject to* Fair Share Fees deduction. Objection letters should include the objector's name, address, social security number, department and bargaining unit. Objectors are requested, but not required, to send the objection letter by certified mail in order to have proof that their objections were timely made and received by SEIU LOCAL 1000. Sending such a letter objecting to use of your fees for activities not germane to collective bargaining will also trigger an additional reduction in your fees in the amount of the Political Action Fund contribution as described below. You do not need to send a second letter to obtain that additional reduction in your fees.

RIGHT TO CHALLENGE THE AMOUNT OF THE FEE

SEIU LOCAL 1000 policy also provides fee payers who object, as described above, to the use of their fees for expenditures not germane to collective bargaining with the right to challenge, in a reasonably prompt hearing before an impartial decision-maker, the determination by SEIU LOCAL 1000 to set the fee for objecting fee payers during the 2007-8 Fee Payer

Year at no more 60.3% of membership dues for the fee payer's salary level.

A hearing date will be set no later than August 31, 2007 regarding the determinations set forth in the above paragraph that are challenged by objecting fee payers. The hearing is to take place before a neutral arbitrator selected by the American Arbitration Association. SEIU LOCAL 1000 will pay for expenses and costs of the arbitrator. Participants in the hearing will be notified of the precise dates and location of the hearing.

Fee payers who wish to participate in such a hearing before an arbitrator and thus challenge the amount of the fee in the 2007-8 Fee Payer Year, must notify SEIU LOCAL 1000's Member Records Unit at 1108 "O" Street, Sacramento, CA 95814, of their desire to so participate by letter postmarked no later than July 12, 2007. The notice need not be sent separately from your objection letter, so long as it clearly indicates your desire to participate in a hearing to challenge the fee before an arbitrator. Such notice should, if possible, include the grounds for the challenge so that SEIU LOCAL 1000 may be able to consider those grounds and determine whether any further reduction in the fee is warranted before the matter proceeds to hearing.

Pending the hearing challenging the amount of the fee, SEIU LOCAL 1000 will place in an escrow account at Wells Fargo Bank, one hundred percent of the fee that is collected from any fee payer who has timely filed an objection to the use of fees for activities not germane to collective bargaining. Fees deposited in such escrow account earn interest at a variable money market rate, the highest rate available for a limited withdrawal account. In the event of a determination at the hearing that the amount chargeable under the law to such objecting fee payers is less than the amount of the fee charged by SEIU LOCAL 1000 during the 2007-8 Fee Payer Year, SEIU LOCAL 1000 will reduce the amount of the fee for all eligible objecting fee payers in accordance with the results of the hearing.

POLITICAL ACTION REDUCTION

Fee payers are also entitled to have their fees reduced by the pro rata portion of the fee that goes to the Political Action Fund that SEIU Local 1000 sets aside for contributions to candidates and initiative campaigns, and other partisan political activities. This amount changes periodically.

If you do not wish to make the political action contribution, please notify in writing SEIU LOCAL 1000's Member Records Unit, 1108 "O" Street, Sacramento, CA 95814, stating that you object to the collection of fees from you for the Political Action Fund. Your monthly fee will then be reduced as soon as possible by the pro rata amount set aside for the Political Action Fund (currently set at $1.50 per month), and any amount deducted after receipt of your request will be promptly refunded to you. If you have already requested and received the reduction of the political action contribution, you need not do so again.

CONSCIENTIOUS OBJECTIONS

Any employee who is a member of a bona fide religious body whose traditional tenets or teachings include objections to joining or financially supporting employee organizations, or has religious practices or beliefs including such objections; is not required to financially support SEIU LOCAL 1000. Instead, the

State Controller will deduct from the paycheck an amount equal to the fair share fee and contribute it to a non-religious, non-labor charitable organization selected by the employee from those approved by the State Board of Control. Employees with such religious beliefs must request the required forms from SEIU LOCAL 1000's Member Records Unit, 1108 "O" Street, Sacramento, CA 95814. Please be advised that if such an employee requests individual representation in a grievance, arbitration or administrative hearing, SEIU LOCAL 1000 is authorized to charge a reasonable fee for such representation.

QUESTIONS

If you have any questions regarding the above described procedures and rights, please write SEIU LOCAL 1000's Member Records Unit at the address noted above or call (916) 444-8134.

[1]HOOD & STRONG LLP
[Logo omitted in printing]

Independent Auditors' Report

THE BOARD OF DIRECTORS
UNION OF CALIFORNIA STATE WORKERS
S.E.I.U. LOCAL 1000 (dba S.E.I.U. Local 1000)
Sacramento, California

We have audited the accompanying Statement of Operating Expenses by Activity and the Allocation Between Chargeable, Non-Chargeable, and Member-Only Benefits Expense (the Financial Statement) for the UNION OF CALIFORNIA STATE WORKERS S.E.I.U. LOCAL 1000 (dba S.E.I.U. LOCAL 1000) (the Local) for the year ended December 31, 2006. This statement is the responsibility of the Local's management. Our responsibility is to express an opinion on this statement based on our audit.

We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statement. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audit provides a reasonable basis for our opinion.

The total expenses reflected in the Financial Statement are based on the operating expenses of the

Local for the year ended December 31, 2006, with regard to the accounting policies based in Note 1. The allocation of operating expenses between chargeable, non-chargeable and member-only benefits expense is based on the definitions and significant factors and assumptions described in Notes 2 and 3. The accompanying statement was prepared for the purpose of determining the fair share cost of services rendered by the Local for employees who are represented by, but not members of, the Local. The accompanying statement is not intended to be a complete presentation of the Local's financial statements.

In our opinion, the Financial Statement presents fairly, in all material respects, the operating expenses of the Local for the year ended December 31, 2006 and the allocation of operating expenses between chargeable, non-chargeable and member-only benefits expense, on the basis of the definitions and significant factors and assumptions described in Notes 2 and 3.

This report is intended solely for the information and use of the Local and its agency fee payers and is not intended to be and should not be used by anyone other than these specified parties.

/s/ Hood & Strong LLP

May 24, 2007

[2]Union of California State Workers S.E.I.U. Local 1000 (dba S.E.I.U. Local 1000) Statement of Operating Expenses By Activity and the Allocation of Expenses Between Chargeable, Non-Chargeable, and Member-Only Benefits Expense

Year Ended December 31, 2006

[Heading omitted in printing of remaining document pages]

Activity Code	Activity	Total Expenses	Chargeable Expenses	Non Chargeable Expenses	Member Only Benefits Expense
100	Contract Proposals, Negotiations and Ratification	$2,567,478	$2,567,478		
110/114	Contract Administration, Enforcement and Grievance Adjustment	6,749,775	6,749,775		
	Representation Before Governmental Boards or Agencies:				
120	Disciplinary matters	898,264	898,264		
121	Contracting out	106,878	106,878		
122/123	SPB: Other matters, complaints and appeals	119,612	119,612		
124/125	PERB: Unfair labor practices	84,354	84,354		
126/127	PERB: Other matters	22,545	22,545		
128	PERS matters	13,352	13,352		
129	State licensing board matters	-			
130	Board of control matters	80		$ 80	
131	Unemployment Ins./ Workers Comp.	146		146	
132	Discrimination matters	58,467	58,467		
133	U.S. Dept. of Labor: FLSA matters	-			
134	Other federal agency or board matters	344		344	
135	Other state agency or board matters	5,654		5,654	
	Litigation:				
140	Contracting out litigation	7,604	7,604		
141	Discrimination litigation	12,654	12,654		
142	Other litigation on behalf of Local-represented employees or the Local which involves wages, hours, benefits, working conditions or other employee rights	25,850	25,850		
143	Fair Share Fee litigation and arbitration	87,903	87,903		
144	Other litigation which does not involve the wages, hours, benefits, working conditions or other employee rights of Local represented employees	72,276		72,276	
150	Conferences, discussion or background reading concerning wages, hours, employee rights, representational skills, etc.	478,408	478,408		
160	Decertification/fair share fee rescission defense	32,660		32,660	
170	Organization in new units	162		162	
180	Membership Recruitment	25,327		25,327	
190	Political Education	964		964	
200	Community Service/Charitable Activities	78,188		78,188	

The accompanying notes are an integral part of this statement.

FC Activity Code	Activity	Total Expenses	Chargeable Expenses	Non-Chargeable Expenses	Member-Only Benefits Expense
210	Other Activity (Job Related)	88,994	88,994		
211	Other Activity (Non-Job Related)	4,510		4,510	
220-226 215-248	Political Activity and Local PAC Activities	829,871		829,871	
	Communications:				
230	Local and Bargaining unit and corporate publications	420,067	348,740	71,327	
231	Leadership letters, and other communiques	206,985	171,839	35,146	
232	Public and media relations	402,079	333,806	68,273	
233	Other publications (Job Related)	170,396	141,462	28,933	
234	Other publications (Non-Job Related)	20,726		20,726	
235	Website	186,966	155,214	31,752	
	Legislative:				
240	Introduced, supported and opposed legislation – job related	31,483	31,483		
241	Introduced, supported and opposed legislation – non job related	341		341	
242	Budgetary legislation	32,306	32,306		
243	Screening and watching legislation	55,069		55,069	
244	Legislative activities not tied to particular legislation	70,272		70,272	
	Meetings and Governance:				
250	General Council	255,403	255,403		
251	Board and officer meetings and activities	446,040	446,040		
252	Local and HCA meetings and activities	1,490,750	1,490,750		
253	Committee meetings - general subject matter	55,061	55,061		
254	DLC meetings, administration and leadership training	775,383	680,786	94,597	$ 42,647
255	Internal disputes and election protests	168,083	168,083		
256/257	SEIU and other labor affiliate meetings and activities	9,482,749	1,971,886	7,510,863	4,775
258	Other meetings or activities regarding Local governance	110,283	110,283		

The accompanying notes are an integral part of this statement.

LM Activity Code	Activity	Total Expenses	Chargeable Expenses	Non Chargeable Expense	Member-Only Benefits Expense
	Staff and Local Administrative Activities:				
260	General administration	1,738,525	1,371,899	366,626	5,470
261	Accounting/Financial management	3,418,598	2,419,833	998,765	9,648
262	Fair Share Fee administration	131,749	131,749		
263	Other administrative expenses/ office and equipment services	3,119,063	2,461,296	657,767	9,813
	Member-Only Benefits:				
270	Member death benefits	157,473		157,473	157,473
271-284	Member-only insurance benefits	57,797		57,797	57,797
999	Fight Back Fund Expense	6,712,867	1,260,319	5,452,548	
	Total operating expenses	$42,204,170	25,475,361	16,728,809	287,523
		100.00%	60.36%	39.64%	0.68%

The accompanying notes are an integral part of this statement.

[5]Union of California State Workers S.E.I.U. Local 1000 (dba S.E.I.U. Local 1000) Notes to Statement of Operating Expenses by Activity and the Allocation of Expense between Chargeable, Non-Chargeable and Member-Only Benefits Expense

Year Ended December 31, 2006

[Heading omitted in printing
of remaining document pages]

Note 1- **Summary of Significant Accounting Policies:**

a. Nature and Purpose of the Local

The purpose of the Union of California State Workers S.E.I.U. Local 1000 (the Local) is to represent employees of the State of California in the following matters: salary, benefits and working conditions, assistance in filing and pursuing employee grievances, legal representation on both an individual and class basis, technical assistance in matters of job classification, and legislative advocacy in support of programs beneficial to state employees.

The Local represents State of California Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20 and 21.

b. Affiliation

On January 23, 2004, the Local entered into an affiliation agreement with the Service Employees' International Union. The Local has been designated as "Union of California

State Workers Local 1000, SEIU". The Local pays per capita taxes to SEIU International.

The Local is also affiliated with the California State Employees Association (CSEA). The Local has a service agreement with CSEA to receive support services including administration, accounting services, legal services, communications, member benefits, governmental relations, and access to the CSEA print shop. The Local reimburses CSEA for its usage of these support services. The service agreement also requires the Local to pay its allocated share of the above services when such services are for the benefit of CSEA. These services are known as "CSEA central support". CSEA central support costs incurred by the Local totaled $3,590,669 for 2006. The Local also reimburses CSEA for payroll costs, related overhead items, and any other Local costs paid by CSEA. These reimbursements totaled $12,744,426 for 2006.

c. Basis of Presentation

The accompanying statement was prepared for the purpose of determining the fair share cost of services rendered by the Local for employees represented by, but not members of, the Local. The accompanying statement is not intended to be a complete presentation of the Local's financial position, changes in its net assets, or its cash flows in accordance with accounting principles generally accepted in the United States.

[6]d. Basis of Accounting

The books of account and the financial statements of the Local reflect the accrual basis of accounting in accordance with accounting principles generally accepted in the United States. The expenses detailed herein are from general operating net assets and do not include expenses from separate segregated net assets.

e. Property and Equipment

Depreciation expense is computed using the straight-line method over the estimated useful life of the assets ranging from three to fifteen years.

f. Federal and State Income Taxes

The Local is organized pursuant to the General Non-Profit Law of the State of California and is exempt from State and Federal income taxes under I.R.C. Section 501(c)(5) and California Revenue and Taxation Code Section 23701(a).

g. Estimates

The preparation of financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions that affect certain reported amounts and disclosures. Accordingly, actual results could differ from those estimates.

h. Background - Non-Member Fees

In 1986, the United States Supreme Court issued a decision regarding certain procedures that must be followed by a local union that is collecting fair share fees from non-members under a collective bargaining agreement with a public employer. In Chicago Teachers Union vs. Hudson, the United States Supreme Court reaffirmed the constitutionality of such fair share fee agreements, originally upheld in Abood vs. Detroit Board of Education. In another earlier case, Ellis vs. Railway Clerks, the United States Supreme Court had held that certain union expenditures could be charged to fair share fee payers, but that certain others could not be charged.

In 1988, the United States Supreme Court issued a decision holding that unions covered under the National Labor Relations Act (NLRA) may not charge non-members fees for non-representational activities when the non-members are covered by collective bargaining agreements and object to such fees for nonrepresentational activities. This decision, known as Communication Workers of America vs. Beck, applies to the standard union shop, where the board and courts have long held that any bargaining unit employee may opt to be classified as a "financial core status employee" if he/she does not wish to join the union.

[7]**Note 2- Definitions**:

This statement sets forth the Local's activities and the expenditures associated with each activity. The numbering of each activity is from a coding system used by the Local to keep track of the time and expenses associated with each activity. Following each activity is a brief description of the nature of that activity and the type of expenditures included. These activities are grouped into three categories for this report: a) those activities determined by the Local to be fully chargeable for all fee payers, b) those activities determined by the Local to be entirely non-chargeable to objecting fee payers, c) those activities determined by the Local to be partly chargeable and partly non-chargeable to fee payers.

a. Chargeable Expenses

100 Contract Proposals, Negotiations and Ratification

This activity encompasses the development, presentation and ratification by employees of contract proposals. Such activity includes formulation of bargaining goals, priorities and proposals, together with related research and drafting of supporting arguments; Bargaining Unit Council and other meetings devoted to discussion of contract proposals, negotiations or ratification; the process of receiving input from bargaining unit employees through surveys, worksite meetings or other means regarding matters to be negotiated, including worksite committee development and meetings in support of bargaining; education, research and training related to contract proposals, negotiations, or ratification, including training and orientation of Bargaining Unit Council members; negotiation of contracts; participation in any impasse procedures related to contract negotiations (i.e., fact finding, mediation or arbitration); ratification by the bargaining units; preparation and distribution of material such as flyers, draft contracts, reports and other publicity work (both within and outside and Local, including public and media relations) regarding the status of contract proposals, negotiations and ratification; distribution of leaflets; demonstrations and job actions related to contract proposals, negotiations and ratification; and litigation arising out of activities in support of the Local's position on contract proposals, negotiations or ratification.

[8]*110/114 Contract Administration, Enforcement and Grievance Adjustment*

Activities that relate to administration and enforcement of the contract once negotiated include all aspects of handling grievances or arbitrations under the contract, including preparation, participation and follow-up, internal Local arbitration appeals, and any appeals or other proceeding (including court litigation) involving enforcement of the contract; all aspects of the job steward program, including steward training supervision, activities and meetings; providing information to employees through worksite meetings, mailers or otherwise about their rights under the contract, the grievance arbitration process, and problems or questions about contract administration issues; handling employees' questions and complaints on contracts rights, grievances and other contract administration issues; meetings, phone calls and correspondence with representatives of the State employer to discuss the interpretation of the contract generally or to discuss particular grievances or problems under the contract; BUC and other meetings devoted to discussion of problems relating to administration or implementation of the contract; and education, research and training related to grievance handling and other aspects of contract administration.

120 Disciplinary Matters
Representation of employees in disciplinary matters arising in the course of their employment.

121 / 140 Contracting Out / Contracting Out Litigation
Action by Local representatives to prevent the State of California from eliminating or reducing state jobs in Local-represented units by entering into contracts with private employers for services available through state government employees.

122 / 123 SPB: Other Matters, Complaints and Appeals
Representation of employees before the State Personnel Board on such matters as examination appeals, classification disputes, appeals regarding voided appointments, and other merit-related appeals.

124 / 125 PERB: Unfair Labor Practices
The pursuit and defense of unfair labor practice charges before the Public Employment Relations Board (PERB) that arise from alleged violation of such matters as defined in statute.

126 / 127 PERB: Other Matters
Representation before PERB on such matters as petitions regarding the composition of units, unit modification or severance proposals, election challenges and injunctive relief.

[9]*128 PERS Matters*
Representation before the Public Employees Retirement System regarding health and welfare plans of state employees and on matters related to the funding of current and future retirement benefits.

132 / 141 Discrimination Matters / Discrimination Litigation
Representation of employees charging work-related discrimination.

142 Other Litigation on Behalf of Local-Represented Employees or the Local Which Involves Wages, Hours, Benefits, Working Conditions or Other Employee Rights
This activity includes litigation on matters such as the prevention of transfers of funds from the Public Employees Retirement System to the State of California general operating account. This litigation also involves representation of individual unit members before courts of competent jurisdiction in defense of their wages, hours and working conditions, in instances where informal or administrative remedies are unavailable or have been exhausted.

143 Fair Share Fee Litigation and Arbitration

This activity includes litigation regarding challenges to the Local's right to collect fees, and annual arbitrations regarding the amount of the fees the Local charges to fee payers who have filed objections to paying for any activities not germane to collective bargaining.

150 Conferences, Discussion or Background Reading Concerning Wages, Hours, Employee Rights, Representational Skills, etc.

This activity includes all readings, meetings, conferences, or other activities not covered by another activity which provide background information or education as opposed to research on or development of specific proposals related to wages, hours, benefits, working conditions, employee rights, industry developments in public sector employment or labor relations, representational skills, or other matters pertinent to improving the working lives of Local-represented employees. This activity also includes general professional reading by staff, and the purchase and maintenance of publications used in such representation, such as the research and law libraries.

210 Other Activity (Job Related)
This is a miscellaneous category that is used only in the rare case when none of the other more descriptive categories apply to an activity involving wages, hours, benefits, working conditions, employee rights or other matters pertinent to improving the working lives of Local-represented employees.

[10]*240 Introduced, Supported and Opposed Legislation*
Research, analysis, writing, meetings, testimony or other legislative advocacy regarding legislation introduced, supported or opposed by the Local which relates to the wages, hours, benefits, working conditions, bargaining rights or other employee rights of all or some groups of Local-represented employees. Examples include legislation on contracting out, statutory rights of Local-represented employees, employee health and safety matters, and revisions to the bargaining process under HEERA.

242 Budgetary Legislation
Research analysis, writing, meetings, testimony or other legislative advocacy regarding budgetary legislation. Other legislative expenditures are in activities 240, 243 and 244.

250 General Council

Every two years, delegates from CSEA's affiliates (including the Local), plus ex-officio delegates, meet as a General Council to elect statewide officers for the next two years, adopt budgets and consider resolutions regarding CSEA's governance, goals, objectives and procedures.

251 Board and Officer Meetings and Activities

All aspects of preparation for, participation in and follow-up to CSEA Board of Directors and officer elections and meetings, and other activities not concerned with a single subject matter covered by another activity.

252 Local and BUC Meetings and Activities

All aspects of preparation for, participation in and follow-up to Local and Bargaining Unit Council elections and meetings, and other activities not concerned with a single subject matter covered by another activity.

253 Committee Meetings – General Subject Matter

All aspects of preparation for, participation in and follow-up to meetings of standing or ad hoc committees of CSEA or the Local that involve a general subject matter not covered by another activity and are concerned with wages, hours, benefits, working conditions or other employee rights of Local-represented employees.

255 Internal Disputes and Election Protests
Resolution of internal disputes, grievances and election protests, including costs of the Hearing Officers Panel.

[11]*258 Other Meetings or Activities Regarding Local Governance*
Meetings or activities related to Local governance that are not covered by other activities. This includes preparation for and participation in the follow-up to meetings of committees such as Bylaws, Policies and Procedures, and Operations; legal advice or other work regarding the Local's corporate status, bylaws and other governance matters; and meetings of Local-represented employees with Local board members, officers or other Local officials that are not on a specific subject covered by another activity.

262 Fair Share Fee Administration

b. Non-Chargeable Expenses
129 State Licensing Board Matters

130 Board of Control Matters

131 Unemployment Insurance / Workers Compensation

134 / 135 / 136 Other Federal or State Agency or Board Matters
Advice, consultation and inquiry of agencies on employment-related matters not covered in other activities.

144 Other Litigation Which Does Not Involve the Wages, Hours, Benefits, Working Conditions or Other Employee Rights of Local-Represented Employees
Litigation not chargeable to fee payers.

160 Decertification / Fair Share Fee Rescission Defense
This category includes all costs associated with the Local's efforts to defeat attempts to decertify the Local as a Bargaining Unit representative or to rescind the Local's right to collect fair share fees in a Bargaining Unit.

170 Organizing New Units

180 Membership Recruitment
All activities to obtain new members in bargaining units or divisions that are currently represented by the Local, including the cost of meetings held principally for that purpose as well as the costs of recruitment material.

[12]*190 Political Education*
Costs related to education of members on political matters not chargeable to fee payers.

200 Community Service/Charitable Activities

Contributions or activities (i.e., benefit events or Local-sponsored volunteer activity) on behalf of community or charitable organizations.

211 Other Activity (Non-Job Related)

This is a miscellaneous category used only when none of the other more descriptive categories apply to an activity which affects the lives of Local-represented employees more as general citizens than as employees, because it did not involve their wages, hours, benefits, working conditions, employee rights or other matters pertinent to improving their work lives. Examples of these activities are participation in strike activity by other unions not directly involving Local-represented employees, and participation as a Local representative in meetings or conferences of organizations having no relationship to the wages, hours, benefits, working conditions, development in public sector employment or labor relations, representational skills or other matters pertinent to the working lives of Local-represented employees.

220-226, 245-248 Political Activity and the Local 1000 PAC Activities

This category of expenditure reflects the Local's participation in political activity, including management of the Political Action Fund, a separate fund not included in the general fund account. This Fund is financed by a portion of dues and fees set by the Local's Board of Directors. Members and fee payers who inform the Local in writing that they do not wish to make such contributions to the Fund are not required to do so. Uses of this Fund include contributions to selected political candidates for California state office and to support or oppose ballot measures and initiatives. Other political activity of the Local includes the coordination of volunteer work on behalf of any political organization or candidate for political office as well as research, analysis, writing, meetings, financial contributions and other advocacy regarding ballot initiatives supported or opposed by the Local.

234 Other Publications (Non-Job Related)

243 Screening and Watching Legislation

Initial screening and analysis of legislation to determine whether the Local will take a position on it, and continued monitoring of legislation on which the Local has taken a "watch" position.

[13]*244 Legislative Activities Not Tied to Particular Legislation*

Legislative meetings or contacts not concerned with particular legislation, but undertaken for the purpose of enhancing the Local's general effectiveness in the Legislature. Any meetings involving political action activities or support of particular legislators are included in activities 220-226 and 245-248.

270 Member Death Benefits

All costs of providing, promoting and administering the Local's member death benefits program.

271/284 Member-Only Insurance Benefits

The Local provides numerous opportunities for members to participate in insurance programs. The cost of plan administration is reimbursed by insurance carriers.

c. Partially Chargeable/Non-Chargeable (Allocation methodology Note 3a)

230 Local and Bargaining Unit Publications

231 Leadership Letters and Other Communiqués

This activity includes all costs associated with leadership letters and any other reports or communiqués of a general nature concerning a variety of subject matters which are directed at Local-represented employees or leadership.

232/236 Public and Media Relations, Website
This activity includes all costs of the Local's media relations and public relations activities (including such matters as the distribution of leaflets, website maintenance, demonstrations, speeches, advertisements and press releases directed toward members of the general public) on matters not devoted to contract proposals, negotiations, ratification, or Local 1000 PAC or other political activities.

233 Other Publications (Job Related)
This activity includes the production of publications (i.e., reports, brochures or handbooks – whether on a single subject or multiple subjects) that concern the wages, hours, benefits, working conditions or other employee rights of Local-represented employees, but do not relate to a single subject matter covered by one of the other activities.

[14]*254 DLC Meetings, Administration and Leadership Training*
The Local has District Labor Councils (DLCs) throughout the state that receive a portion of the Local's dues revenue for funding of state employee representation at the local level. Typical activities of the DLCs include newsletters to inform employees of Local decisions at com-

mittee and Board meetings, preparation of proposals for bargaining, preparation for the ratification decision, creation of job steward committees and social gatherings. This activity includes the cost of all DLC meetings, the administration of DLCs (including monthly dues allocations) and training of DLC officers.

256/257 SEIU and Other Labor Affiliate Meetings and Activities

The Local participates in meetings and activities of its international affiliate, the Service Employees International Union (SEIU), and other regional labor organizations affiliated with the SEIU (e.g., the SEIU State Council), with which the Local is also affiliated. This activity includes the cost of affiliation fees, which are used on a variety of activities including research and staff assistance to local affiliates such as the Local on bargaining, contract enforcement, field representation, organizing, and union governance. The SEIU also uses these fees for numerous other activities and expenditures such as its affiliation fees, political activities, organizing, publications and administrative expenses.

260 General Administration

Includes staff meetings, discussion and staff memoranda of a general nature, including staff personnel matters, staff training (to the extent not on a single subject covered by another activity), and typical administrative matters such as opening mail.

261 Accounting/Financial Management

Administration of the Local's financial affairs, including budgeting, cost analysis, planning and control, computer systems development, accountting, payroll, record keeping and data processing.

263 Other Administrative Expenses/ Office and Equipment Services

Other administrative matters not covered in activities 260-262, including expenses related to the provision of office space, office supplies, corporate insurance, the switchboard, in-house mail delivery and messengers; legal representation (including litigation) regarding the Local's leases, contracts and other obligations with respect to third parties; dealings with the State Employees Building Corporation; the purchase, assignment and maintenance of vehicles and other equipment, and any other office or equipment matters.

[15]*999 Fight Back Fund Expense*
This fund was established under a temporary dues assessment and is used to account for expenses for specific initiatives and other political issues related to the terms and conditions of employment of members and feepayers or the preservation of bargaining unit work.

Note 3 - **Significant Factors and Assumptions Used in the Allocation of Operating Expenses for the Computation of Chargeable and Non-Chargeable Expenses:**

a. Allocation - Specific Activity Codes
230, 231, 232, 233, 236 Publications, Letters, Communiqués, & Public Relations
Based upon a review of the content of the Local's and CSEA's publications, an allowance of 16.98% of the Local's costs are non-chargeable to reflect the portion of publications pertaining to activities that would not be chargeable to objecting fee payers.

254 DLC Meetings, Administration & Leadership Training
The financial information of the Local's DLCs has been audited by an external Certified Public Accountant. All expenditures allocated to these DLCs have been classified as chargeable, non-chargeable, and member-only benefits expense based on these audits. The expenditures of

any DLCs that were not audited were classified as non-chargeable to objecting fee payers.

999 Fight Back Fund Expense
The Local separately accounts for all Fight Back Fund Expenses. All expenses included were allocated based on the same criteria as this report but are accounted for separately. A separate audit of the Fight Back Fund expenditures has been prepared.

[16]*256/257 SEIU and Other Labor Affiliate Meetings and* Activities
A portion of the Local's affiliation expenditures is considered to be non-chargeable to reflect the portions of the SEIU International's expenditures and expenditures made by other affiliated groups that may be considered to be non-chargeable to objecting fee payers. Based upon an analysis prepared by the SEIU and audited by a Certified Public Accountant, it was concluded that 75.41% of the SEIU International's expenditures were not chargeable to objecting fee payers. The Local has applied the same 75.41% to its SEIU International expenditures.

Other affiliated group expenditures are not audited by a Certified Public Accountant and are therefore considered non-chargeable to objecting fee payers.

Expenditures	Total Expenses	Chargeable Expenses	Non-Chargeable Expenses	Member-Only Benefits Expenses
SEIU International	$ 8,019,056	$ 1,971,886	$ 6,047,170	$ 4,675
Other affiliated groups	1,463,693		1,463,693	
	$ 9,482.749	$ 1,971,886	$ 7.510,863	$ 4.675

260, 261, 263 General Administration, Accounting and Administrative Expense

General administration, accounting and administrative expenses are primarily allocated based on the ratio of the combined total of chargeable, non-chargeable and member-only benefits expenses for all other activity codes which require administrative attention.

[17]Note 4 - Reconciliation of Total Expense to Audited Financial Statement Expenses

Total Expenses included on page 4	$ 42,204,170
Expenses included in this report, but netted against revenue in audited financial statement:	
Chapter Administration	(707,824)
Chapter forfeits (net of grants)	21.552
Dues deduction processing fee	(123,551)
Financial statement revenue, netted against expenses included in this report:	
Affiliate rebates	5,198,465
Other income	3,360
Revenue credited to Local 1000 in the CSEA Central Support billing	(219,241)
Audited Financial Statement Expenses	$ 46.376,951

[18]HOOD & STRONG LLP
[Logo omitted in printing]

Independent Auditors' Report

THE BOARD OF DIRECTORS
UNION OF CALIFORNIA STATE WORKERS
S.E.I.U. LOCAL 1000 (dba S.E.I.U. Local 1000)
Sacramento, California

We have audited the accompanying Statement of Identified Expenses and the Allocation Between Chargeable and Non-Chargeable Expenses (the Financial Statement) for the UNION OF CALIFORNIA STATE WORKERS S.E.I.U. LOCAL 1000 (dba S.E.I.U. Local 1000) Special Assessment Fund (the Fund) for the year ended December 31, 2006. This statement is the responsibility of the Local's management. Our responsibility is to express an opinion on this statement based on our audit.

We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statement is free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statement. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audit provides a reasonable basis for our opinion.

The total identified expenses reflected in the Financial Statement are based on the identified expenses of the Fund for the year ended December 31, 2006, with regard to the accounting policies based in Note 1. The allocation of identified expenses between chargeable and non-chargeable expenses is based on the definitions and significant factors and assumptions described in Notes 2 and 3. The accompanying statement is not intended to be a complete presentation of the financial statements of Union of California State Workers S.E.I.U. Local 1000.

In our opinion, the Financial Statement presents fairly, in all material respects, the identified expenses of the Fund for the year ended December 31, 2006 and the allocation of identified expenses between chargeable and non-chargeable expenses, on the basis of the definitions and significant factors and assumptions described in Notes 2 and 3, on the basis of accounting as discussed in Note 1.

This report is intended solely for the information and use of the Union of California State Workers S.E.I.U. Local 1000 and its agency fee payers and is not intended to be and should not be used by anyone other than these specified parties.

/s/ Hood & Strong LLP

May 24, 2007

[19]Union of California State Workers S.E.I.U. Local 1000 (dba S.E.I.U. Local 1000)

Special Assessment Fund Statement of Identified Expenses and the Allocation Between Chargeable and Non-Chargeable Expenses

Year Ended December 31, 2006

[Heading omitted in printing of remaining document pages]

Activity Code	Activity	Total Expenses	Chargeable Expenses	Non-Chargeable Expenses
100	Contract Proposals, Negotiations and Ratification	$ 976,111	$ 976,111	
110/114	Contract Administration, Enforcement and Grievance Adjustment	62,387	62,387	
	Litigation			
143	Fair Share Fee litigation and arbitration	121,698	121,698	
150	Conferences, discussion or background reading concerning wages, hours, employee rights, representational skills, etc.	2,571	2,571	
210	Other Activity (Job Related)	218	218	
220-226 245-248	Political Activity and Local 1000 PAC Activities	5,443,721		$ 5,443,721
	Communications:			
232	Public and media relations	41,829	34,726	7,103
	Legislative:			
244	Legislative activities not tied to particular legislation	307		307
	Meetings and Governance:			
252	Local and BUC meetings and activities	46,283	46,283	
254	DLC meetings, administration and leadership training	296	260	36
258	Other meetings or activities regarding Local governance	1,442	1,442	

The accompanying notes are an integral part of this statement.

[20] Activity Code	Activity	Total Expenses	Chargeable Expenses	Non-Chargeable Expenses
	Staff and Local Administrative Activities:			
260	General administration	7,940	7,884	56
261	Accounting/Financial management	6,289	4,965	1,324
262	Fair Share Fee administration	1,613	1,613	
263	Other administrative expenses/ office and equipment	162	161	1
	Total operating expenses	$ 6,712,867	$ 1,260,319	$ 5,452,548
		100.00%	18.77%	81.23%

The accompanying notes are an integral part of this statement

[21]Note 1 - Summary of Significant Accounting Policies:

a. Nature and Purpose of the Local

The purpose of the Union of California State Workers S.E.I.U. Local 1000 (the Local) is to represent employees of the State of California in the following matters: salary, benefits and working conditions, assistance in filing and pursuing employee grievances, legal representation on both an individual and class basis, technical assistance in matters of job classification, and legislative advocacy in support of programs beneficial to state employees.

The Local represents State of California Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20 and 21.

This statement sets forth the Local's expenditures associated with the "Fight Back" fund. This fund was established under a temporary dues and fees assessment and is used to account for expenses for specific initiatives and other political campaigns and issues related to the terms and conditions of employment of members and fee payers and the preservation of bargaining unit work.

b. Affiliation

On January 23, 2004, the Local entered into an affiliation agreement with the Service Employees' International Union. The Local has been designated as "Union of California State Workers Local 1000, SEIU." The Local pays per capita taxes to SEIU International.

The Local is also affiliated with the California State Employees Association (CSEA). The Local has a service agreement with CSEA to receive support services including administration, accounting services, legal services, communications, member benefits, governmental relations, and access to the CSEA print shop. The Local reimburses CSEA for its usage of these support services. The service agreement also requires the Local to pay its allocated share of the above services when such services are for the benefit of CSEA. These services are known as "CSEA central support". CSEA central support costs incurred by the Local totaled $3,590,669 for 2006. The Local also reimburses CSEA for payroll costs, related overhead items, and any other Local costs paid by CSEA. These reimbursements totaled $12,744,426 for 2006.

[22]c. Basis of Presentation

The accompanying statement was prepared for the purpose of determining the fair share cost of services rendered by the Local for employees represented by, but not members of, the Local and only relates to the identified expenses included in the special assessment "Fight Back" fund. The accompanying statement is not intended to be a complete presentation of the Local's financial position, changes in its net assets, or its cash flows in accordance with accounting principles generally accepted in the United States.

d. Basis of Accounting

The books of account and the financial statements of the Local reflect the accrual basis of accounting in accordance with accounting principles generally accepted in the United States. The expenses detailed herein are from the special assessment "Fight Back" fund and do not include expenses from separate segregated net assets or general operating net assets.

e. Property and Equipment

Depreciation expense is computed using the straight-line method over the estimated useful life of the assets *ranging from three to fifteen years.*

f. Federal and State Income Taxes
The Local is organized pursuant to the General Non-Profit Law of the State of California and is exempt from State and Federal income taxes under I.R.C. Section 501(c)(5) and California Revenue and Taxation Code Section 23701(a).

g. Estimates
The preparation of financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions that affect certain reported amounts and disclosures. Accordingly, actual results could differ from those estimates.

h. Background - Non-Member Fees
In 1986, the United States Supreme Court issued a decision regarding certain procedures that must be followed by a local union that is collecting fair share fees from nonmembers under a collective bargaining agreement with a public employer. In Chicago Teachers Union vs. Hudson, the United States Supreme Court reaffirmed the constitutionality of such fair share fee agreements, originally upheld in Abood vs. Detroit Board of Education. In another earlier case, Ellis vs. Railway Clerks, the United States

Supreme Court had held that certain union expenditures could be charged to fair share fee payers, but that certain others could not be charged.

[23]In 1988, the United States Supreme Court issued a decision holding that unions covered under the National Labor Relations Act (NLRA) may not charge non-members fees for nonrepresentational activities when the non-members are covered by collective bargaining agreements and object to such fees for nonrepresentational activities. This decision, known as Communication Workers of America vs. Beck, applies to the standard union shop, where the board and courts have long held that any bargaining unit employee may opt to be classified as a "financial core status employee" if he/she does not wish to join the union.

Note 2- **Definitions:**

This statement sets forth the Local's activities and the expenditures associated with each activity. The numbering of each activity is from a coding system used by the Local to keep track of the time and expenses associated with each activity. Following each activity is a brief description of the nature of that activity and the type of expenditures included. These activities are grouped into three categories for this report:

a) those activities determined by the Local to be fully chargeable for all fee payers, b) those activities determined by the Local to be entirely non-chargeable to objecting fee payers, c) those activities determined by the Local to be partly chargeable and partly non-chargeable to fee payers.

a. Chargeable Expenses

100 Contract Proposals, Negotiations and Ratification

This activity encompasses the development, presentation and ratification by employees of contract proposals. Such activity includes formulation of bargaining goals, priorities and proposals, together with related research and drafting of supporting arguments; Bargaining Unit Council and other meetings devoted to discussion of contract proposals, negotiations or ratification; the process of receiving input from bargaining unit employees through surveys, worksite meetings or other means regarding matters to be negotiated, including worksite committee development and meetings in support of bargaining; education, research and training related to contract proposals, negotiations, or ratification, including training and orientation of Bargaining Unit Council members; negotiation of contracts; participation in any impasse procedures related to contract negotiations (i.e., fact finding, mediation or arbitration); ratification by the bargaining units; preparation and distribution of material such as flyers, draft contracts, reports and other publicity work (both within and outside the Local, including public and media relations) regarding the status of contract proposals, negotiations and ratification; distribution of leaflets; demonstrations and job actions related to contract proposals, negotiations and ratification; and litigation arising out of activities in support of the Local's position on contract proposals, negotiations or ratification.

[24]*110/114 Contract Administration, Enforcement and Grievance Adjustment*

Activities that relate to administration and enforcement of the contract once negotiated include all aspects of handling grievances or arbitrations under the contract, including preparation, participation and follow-up, internal Local arbitration appeals, and any appeals or other proceeding (including court litigation) involving enforcement of the contract; all aspects of the job steward program, including steward training supervision, activities and meetings; providing information to employees through worksite meetings, mailers or otherwise about their rights under the contract, the grievance arbitration process, and problems or questions about contract administration issues; handling employees' questions and complaints on contracts rights, grievances and other contract administration issues; meetings, phone calls and correspondence with representatives of the State employer to discuss the interpretation of the contract generally or to discuss particular grievances or problems under the contract; BUC and other meetings devoted to discussion of problems relating to administration or implementation of the contract; and education, research and training related to grievance handling and other aspects of contract administration.

143 Fair Share Fee Litigation and Arbitration

This activity includes litigation regarding challenges to the Local's right to collect fees, and annual arbitrations regarding the amount of the fees the Local charges to fee payers who have filed objections to paying for any activities not germane to collective bargaining.

150 Conferences, Discussions or Background Reading Concerning Wages, Hours, Employee Rights, Representational Skills, etc.

This activity includes all readings, meetings, conferences, or other activities not covered by another activity which provide background information or education as opposed to research on or development of specific proposals related to wages, hours, benefits, working conditions, employee rights, industry developments in public sector employment or labor relations, representational skills, or other matters pertinent to improving the working lives of Local-represented employees. This activity also includes general professional reading by staff, and the purchase and maintenance of publications used in such representation, such as the research and law libraries.

210 Other Activity (Job Related)

This is a miscellaneous category that is used only in the rare case when none of the other more descriptive categories apply to an activity involving wages, hours, benefits, working conditions, employee rights or other matters pertinent to improving the working lives of Local-represented employees.

[25]*252 Local and BUC Meetings and Activities*

All aspects of preparation for, participation in and follow-up to Local and Bargaining Unit Council elections, meetings and other activities not concerned with a single subject matter covered by another activity.

258 Other Meetings or Activities Regarding Local Governance
Meetings or activities related to Local governance that are not covered by other activities. This includes preparation for and participation in the follow-up to meetings of committees such as Bylaws, Policies and Procedures, and Operations; legal advice or other work regarding the Local's corporate status, bylaws and other governance matters; and meetings of Local-represented employees with Local board members, officers or other Local officials that are not on a specific subject covered by another activity.

262 Fair Share Fee Administration

b. Non-Chargeable Expenses

220-226, 245-248 Political Activity and Local 1000 PAC Activities
This category of expenditure reflects the Local's participation in political activity, including management of the Political Action Fund, a separate fund not included in the general fund account. This Fund is financed by a portion of dues and fees set by the Local's Board of Directors. Members and fee payers who inform the Local in writing that they do not wish to make such contributions to the Fund are not required to do so. Uses of this Fund include contributions to selected political candidates for

California state office and to support or oppose ballot measures and initiatives. Other political activity of the Local includes the coordination of volunteer work on behalf of any political organization or candidate for political office as well as research, analysis, writing, meetings, financial contributions and other advocacy regarding ballot initiatives supported or opposed by the Local.

244 Legislative Activities Not Tied to Particular Legislation
Legislative meetings or contacts not concerned with particular legislation, but undertaken for the purpose of enhancing the Local's general effectiveness in the Legislature. Any meetings involving political action activities or support of particular legislators are included in activities 220-226 and 245-248.

[26]c. Partially Chargeable/Non-Chargeable (Allocation methodology Note 3a)

232 Public and Media Relations
This activity includes all costs of the Local's media relations and public relations activities (including such matters as the distribution of leaflets, website maintenance, demonstrations, speeches, advertisements and press releases directed toward members of the general public) on matters not devoted to contract

proposals, negotiations, ratification, or Local 1000 PAC or other political activities.

254 DLC Meetings, Administration and Leadership Training

The Local has District Labor Councils (DLCs) throughout the state that receive a portion of the Local's dues revenue for funding of state employee representation at the local level. Typical activities of the DLCs include newsletters to inform employees of Local decisions at committee and Board meetings, preparation of proposals for bargaining, preparation for the ratification decision, creation of job steward committees and social gatherings. This activity includes the cost of all DLC meetings, the administration of DLCs (including monthly dues allocations) and the training of DLC officers.

260 General Administration

Includes staff meetings, discussion and staff memoranda of a general nature, including staff personnel matters, staff training (to the extent not on a single subject covered by another activity), and typical administrative matters such as opening mail.

261 Accounting/Financial Management

Administration of the Local's financial affairs, including budgeting, cost analysis, planning and control, computer systems development, accounting, payroll, record keeping and data processing.

263 Other Administrative Expenses/ Office and Equipment Services

Other administrative matters not covered in activities 260-262, including expenses related to the provision of office space, office supplies, corporate insurance, the switchboard, in-house mail delivery and messengers; legal representation (including litigation) regarding the Local's leases, contracts and other obligations with respect to third parties; dealings with the State Employees Building Corporation; the purchase, assignment and maintenance of vehicles and other equipment, and any other office or equipment matters.

[27]Note 3 - **Significant Factors and Assumptions Used in the Allocation of Identified Expenses for the Computation of Chargeable and Non-Chargeable Expenditures:**

a. Allocation - Specific Activity Codes

232 Public and Media Relations

Based upon a review of the content of the Local's publications, an allowance of 16.98% of the Local's costs are non-chargeable to reflect the portion of publications pertaining to activities that would not be chargeable to objecting fee payers.

254 DLC Meetings, Administration & Leadership Training

The financial information of the Local's DLCs has been audited by an external Certified Public Accountant. All expenditures allocated to these DLCs have been classified as chargeable and non-chargeable based on these audits. The expenditures of any DLCs that were not audited were classified as non-chargeable to objecting fee payers.

260, 261, 263 General Administration, Accounting and Administrative Expense

General administration, accounting and administrative expenses are primarily allocated based on the ratio of the combined total of chargeable and non-chargeable expenses for all other activity codes which require administrative attention.

[28]TOAL, GRIFFITH & AYERS, LLC

CERTIFIED PUBLIC ACCOUNTANTS

200 HARRY S. TRUMAN PARKWAY, STE. 110

ANNAPOLIS, MARYLAND 21401

Voice: (410) 224-0343, Facsimile (410) 224-0043

Independent Auditor's Report

The Executive Board of the
Service Employees International Union, CTW, CLC

We have audited the accompanying consolidated statement of expenses and allocation between chargeable and non-chargeable expenses - series 3 of the Service Employees International Union, CTW, CLC - United States Division (the International Union) for the year ended December 31, 2005. This consolidated statement is the responsibility of the International Union's management. Our responsibility is to express an opinion on this consolidated statement based on our audit. We did not audit the total expenses reflected in Column A of the consolidated financial statements. Total expenses were audited by other auditors whose report has been furnished to us, and our opinion, insofar as it relates to the amounts in Column A, is based solely on the report of the other auditors.

We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the consolidated statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the statement. An audit also includes assessing the accounting principles used and significant estimates made by the International Union's management, as well as evaluating the overall presentation of the consolidated statement. We believe that our audit provides a reasonable basis for our opinion.

The total expenses reflected in Column A of the consolidated statement agree to the expenses in the audited consolidated financial statement of the International Union for the year ended December 31, 2005, as modified to remove from expenses the per capita tax rebates paid to local unions of $13,235,199, political expenses paid from voluntary contributions of $2,115,563, expenses associated with the Eastern and Western Conferences amounting to $27,877, which were paid from funds transferred upon the dissolution of the Eastern and Western Conference affiliates, expenses paid from the Legal Defense Fund of $175,782 and SEIU Communications Center, Inc., expenses totaling $1,426,076. The allocation of expenses between chargeable (Column B) and non-chargeable (Column C) is based on the definitions and significant factors and assumptions described in Notes 2 and 3.

In our opinion, the consolidated statement referred to above present fairly, in all material respects, the consolidated expenses of the Service Employees International Union, CTW, CLC - United States Division for the year ended December 31, 2005, modified as discussed in the preceding paragraph and the allocated consolidated expenses between chargeable and non-chargeable expenses, on the basis of the definitions and significant factors and assumptions described in Notes 2 and 3.

This report is intended solely for the information and use of the Service Employees International Union, CTW, CLC and its agency fee payers and is not intended to be and should not be used by anyone other than those specified parties.

/s/ Toal, Griffith & Ayers, LLC
October 11, 2006

[29]SERVICE EMPLOYEES INTERNATIONAL UNION CTW, CLC

UNITED STATES DIVISION

CONSOLIDATED STATEMENT OF EXPENSE AND ALLOCATION BETWEEN CHARGEABLE AND NON-CHARGEABLE EXPENSES

SERIES 3

YEAR ENDED DECEMBER 31, 2005

	Column A	Column B	Column C	
	Total Expenses	Chargeable Expenses	Non-Chargeable Expenses	Notes
GENERAL FUND				
Personnel Costs				
Organizing	$29,837,609	$6,603,063	$23,234,546	3a
Organizing campaign support	8,228,919	3,250,423	4,978,496	3a
Politics, government and community	4,737,442	992,494	3,744,948	3a
Union communications	6,931,966	2,415,790	4,516,176	3a
Leader support	8,678,646	4,084,171	4,594,475	3a
Administrative and financial services	5,911,940	3,763,541	2,148,399	3a
Professional fees and expenses	10,686,125	4,139,536	6,546,589	3b
Administrative expenses	18,425,829	6,230,894	12,194,935	3c
Contributions	6,330,461	-	6,330,461	3d
Payments to locals				
Subsidies	7,234,504	-	7,234,504	3e
Per capita tax rebates	13,235,199	13,235,199	-	3e
Reimbursements	4,114,694	4,114,694	-	3e
Political subsidies	1,742,838	-	1,742,838	3f
Conferences and meetings	1,999,371	824,938	1,174,433	3g
Communications and media	1,174,208	283,626	890,582	3h
Affiliation fees and assessments	8,133,253	-	8,133,253	3i
Death gratuities	130,683	-	130,683	3j
Member calls and Fundraising	1,365,026	-	1,365,026	3k
State Council return	663,260	663,260	-	3l
Total General Fund	139,561,973	50,601,629	88,960,344	

STRIKE AND DEFENSE FUNDS	10,126,666	10,126,666	-	3m
POLITICAL EDUCATION AND ACTION FUNDS	12,403,402	-	12, 403,402	3n
COMMITTEE ON POLITICAL EDUCATION	2,115,563	-	2,115,563	3n
UNITY FUND	74,885,751	7,271,406	67,614,345	3o
CONVENTION FUND	350,587	350,587	-	3p
LEGAL DEFENSE FUND	175,782	-	175,782	3q
CONFERENCE FUND EXPENSES	27,677	27,677	-	3r
SEIU COMMUNICATIONS CENTER, INC.	1,426,076	1,426,076	-	3s
Total expenses before modification	241,073,677	69,804,241	171,269,436	
LESS				
Per capita tax rebate payments to locals	(13,235,199)	(13,235,199)	-	
Political expenses paid from voluntary contributions	(2,115,563)	-	(2,115,563)	
Conference Fund expenses	(27,677)	(27,677)	-	
Legal Defense Fund	(175,782)	-	(175,782)	
SEIU Communications Center, Inc.	(1,426,076)	(1,426,076)	-	
Total expenses as modified	$224,093,180	$55,115,089	$168,978,091	
	100%	24.59%	75.41%	

[30]SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC

UNITED STATES DIVISION

NOTES TO CONSOLIDATED STATEMENT OF EXPENSES AND ALLOCATION BETWEEN CHAREABLE EXPENSES AND NON-CHARGEABLE EXPENSES –

SERIES 3

DECEMBER 31, 2005

NOTE 1- SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

Method of Accounting

The financial statement has been prepared on the accrual basis of accounting in accordance with generally accepted accounting principles.

Basis of Presentation

The accompanying consolidated statement of expenses and allocation between chargeable and non-chargeable expenses was prepared for the purpose of determining the fair share cost of services rendered by the Service Employees International Union, CTW, CLC - United States Division (the International Union) for employees represented by, but not members of, the International Union and its affiliated local unions. This statement is not intended to be a complete presentation of the International Union's financial position, or changes in its net assets and its cash flows in accordance with generally accepted accounting principles. Under this allocation, organizing expenses are considered to be non-chargeable.

Financial Statement Presentation and Principles of Consolidation

The International Union records its transactions in various funds, each a self-balancing group of accounts. Each fund reflects only those transactions applicable to its designated functional area. The following fund designations are established by the International Union's Constitution or determined by management:

- General Fund
  Records all activity not accounted for in the other funds and includes the general operations of the International Union – U.S. Division, the operations of 1313 L Street, N.W., Inc. (1313 L Street) and 1800 Massachusetts Avenue Corporation, formed to be title holding corporations for the International Union's headquarters building. The general Fund includes the consolidated accounts of 1313 L Street and 1800 Massachusetts Avenue Corporation. All significant inter-company account balances have been eliminated in consolidation.

- Strike and Defense Funds
  Funds established to financially assist local unions and members involved in legitimate strikes and lockouts, and to provide financial assistance for educational programs including newspaper advertisements, leaflets, handbills, and other media-based messages concerning contract ratification. In accordance with the International Union's constitution, local unions may request payments from the Strike and Defense Fund after one year of making per capita payments.

[31][notation omitted in printing]

- Political Education and Action Funds (PEA)
  Records all activities for political education and political action disbursed from per capita tax allocations.

- Committee on Political Education
  Records all activities for political contributions disbursed from net assets received with donor imposed restrictions.

- Unity Fund
  The Unity Fund is a segregated fund financed from local union per capita payments that is used to finance breakthrough campaigns, coordinated bargaining, and other activities designed to increase density in

SEIU's core industries. The Unity Fund is divided among the Property Services, Health Systems, Long Term Care, and Public Services Divisions and a non-divisional fund.

- Convention Fund
  Records all activities for the convention of the International Union which meets every four years.
- Other Funds
  Funds established to account for assets which have been internally segregated for specific purposes as determined by the Executive Board.

Depreciation and Amortization

Depreciation and amortization of property, equipment, and improvements are computed over the estimated lives of the respective assets using the straight-line method.

Tax Status

The International Union is exempt from federal income taxes, except on net income, if any, from unrelated business activities, under Section 501(c)(5) of the Internal Revenue Code. 1313 L Street, [32]NW, Inc. and 1800 Massachusetts Avenue Corporation are exempt from income tax, except on net income, if any, from unrelated business activities, under Section 501(c)(2) of the Internal Revenue Code.

NOTE 2 - DEFINITIONS

The following definitions of chargeable and non-chargeable expenses are based on existing law and the International Union's interpretation of court cases.

a. Chargeable Expenses - Chargeable expenses are those incurred by the International Union that reflect the share of the costs of operations of the International Union which are considered necessarily and reasonably incurred for the purpose of assisting local unions in the performance of their duties as a representative of the employees in dealing with the employer on labor management issues, including the costs of: negotiating and administering the collective bargaining contract; settling grievances and disputes by mutual agreement, or in arbitration, court or otherwise; activities and undertakings normally and reasonably employed to implement the duties of the local union as representative of the employees in the bargaining unit; and the maintenance of the International Union's local unions' existence. The following are examples of expenditures classified as chargeable: preparation for and negotiations of collective bargaining agreements; contract administration including investigating and processing grievances; meetings, conferences, administrative, arbitral and court proceedings and pertinent investigation and research in connection with work-related subjects and issues; handling work-related problems of employees; and providing legal, economic, and technical expertise on behalf of employees in all work-related matters.

b. Non-Chargeable Expenses - Non-chargeable expenses are those expenses incurred by the International Union for the benefit and advancement of represented employees and their union which are not considered representational activities for non-members. Non-chargeable activities include those services that are ideological or political in nature; those that are exclusively for the benefit of full union members; and those that otherwise are not considered germane to the collective bargaining process.

Activities that are classified as non-chargeable include the following: organizing; legislative and government activities outside the limited context of contract ratification or implementation; public relations and other efforts directed towards functional activities that are not considered germane to representing non-members in the collective bargaining process; political activity [33]expenses which include support at the Federal, state, or local level; donations; affiliation fees paid to a labor organization; and the cost of benefits that are not available to non-members.

NOTE 3 - SIGNIFICANT FACTORS AND ASSUMPTIONS USED IN THE ALLOCATION OF CONSOLIDATED EXPENSES BETWEEN CHARGEABLE AND NON-CHARGEABLE

a. Personnel Costs - The International Union has assigned all personnel to either program, leader support, or administrative and financial services departments. Program departments implement the programs of the International Union and provide services to affiliates and local unions.

Administrative and financial services departments include the following departments: Accounting, Human Resources, Information and Technology, Meetings and Travel, and Finance and General Administration. Leader support includes the Executive Office, the International Executive Board, and the National Conference of Firemen and Oilers.

Personnel costs of the Building Operations, Human Resources, Information and Technology, and General Administration Departments have been allocated between chargeable and non-chargeable based on the same ratio as the union's overall allocation of chargeable versus non-chargeable expenditures. Personnel costs include salaries and wages, fringe benefits, payroll taxes, and reimbursed employee expenses.

Personnel costs of full-time officers, professional staff, and management employees in the following departments, divisions, offices, and programs have been allocated between chargeable and non-chargeable based on a time study performed during the year ended December 31, 2005: Executive Office, Accounting, Communications, Field Operations and Campaign Support, Finance and Administration, Meetings and Travel, Government Affairs, Legal, Local Union Organizing, Research, Property Services Organizing, Health Systems Organizing, Long Term Care Organizing, Public Services Organizing, Capitol Stewardship, Institute for Change, Community Strength, and Global Strength. Personnel costs of clerical and technical support personnel in these departments, divisions, offices, and programs have been allocated between chargeable and non-chargeable based on the overall allocation of chargeable versus non-chargeable personnel expenses of their departments, divisions, offices, or programs or on the same percentage basis as the full-time officer, professional staff, or management employee for whom they work exclusively (as appropriate).

b. Professional Fees and Expenses - All professional fees and expenses for outside legal counsel are considered to be chargeable or non-chargeable based on the services performed. Accounting and auditing fees and expenses are considered to be fully chargeable. Other professional fees and expenses are considered to be chargeable or non-chargeable based on the [34]service performed by the consultant. Chargeable activities include expenses for training, speakers, and research matters. Professional fees for consulting services in connection with organizing campaigns, political activities and legislative activities outside the limited scope of contracts ratification or implementation are considered to be fully non-chargeable.

c. Administrative Expenses - Administrative expenses include items such as rent and utilities, office supplies and expenses, investment charges, equipment rental and maintenance, computer expenses, other taxes, depreciation and amortization, printing, postage, telephone, subscriptions, insurance, and bad debt expense. These expenses are allocated to chargeable and non-chargeable expenses based on the same ratio as personnel costs.

d. Contributions - Contributions for charitable, civic, and labor-related purposes are not directly related to the function of representation and are considered to be fully non-chargeable.

e. Payments to Locals - Payments to locals which represent subsidies for organizing are considered to be fully non-chargeable. Payments to locals which represent reimbursements for operating expenses are considered to be fully chargeable. The total expenses, as reported in the audited consolidated financial statement, have been modified to remove from expenses the per capita tax rebates paid to local unions.

f. Political Subsidies - Political subsidies are considered to be fully non-chargeable.

g. Conference and Meetings - Expenses for conferences and meetings are allocated between chargeable expenses and non-chargeable expenses based on the purpose of and topics discussed at the meetings as determined by the department's ratio of personnel costs. Items of a political, legislative, or organizing nature are considered to be non-chargeable. Educational training programs and conferences for local, state, and national staff, which are to enhance skills in collective bargaining, grievance handling, and contract administration are considered to be fully chargeable since they pertain to matters which are germane to collective bargaining. Executive Board meetings and meetings which pertain to the governance of the International Union such as formulating and communicating union internal policy are considered to be fully chargeable.

h. Communications and Media - The expenses relating to the maintenance of the International Union's website have been allocated between chargeable and non-chargeable based on the nature of the work performed throughout the year. For example, expenses related to political or [35]ideological activities are non-chargeable, and expenses related to collective bargaining and contract administration are chargeable.

i. Affiliation Fees and Assessments - Per capita taxes and assessments paid to Change to Win federation and affiliated labor organizations are considered to be fully non-chargeable.

j. Death Gratuities - Death gratuities are benefits paid to a deceased member's family and are considered to be fully non-chargeable.

k. Member Telephone Calls and Fundraising - These expenses are considered to be fully non-chargeable.

l. Regional Conferences - The International Union returns a portion of per capita taxes received from the local unions to the International Union's councils for regional conferences. These governance meetings are considered to be fully chargeable.

m. Strike and Defense Funds - Expenses of the strike and defense funds include financial assistance to local unions involved in legitimate strikes and lockouts in addition to providing financial assistance for educational programs including newspaper advertisements, leaflets, handbills, and other media-based messages concerning contract ratification. All expenses of the strike and defense funds are considered to be fully chargeable.

n. Political Education and Action Funds - Expenses incurred by the Committee on Political Education and the Political Education and Action Funds relate entirely to political and legislative activities and are considered to be fully non-chargeable. The total expenses, as reported in the audited consolidated financial statement, have been modified to remove from expenses the political expenses paid from voluntary contributions.

o. Unity Fund - Expenses of the Unity Fund include financial assistance to local unions involved in breakthrough campaigns to increase union membership. A majority of these expenses are personnel costs. These expenses are allocated to chargeable and non-chargeable expenses based on the allocation of Unity Fund personnel costs which have been determined through a time study.

p. Convention Fund - Expenses for the International Union's convention are considered to be fully chargeable.

[36]q. Legal Defense Fund - Expenses incurred by the Legal Defense Fund are removed from the total expenses, as they are paid solely from court awarded cost reimbursements from lawsuits.

r. Conference Funds - Expenses incurred within this Fund are paid from funds transferred upon the dissolution of the Eastern and Western Conferences and are accordingly removed from the total expenses.

s. SEIU Communications Center, Inc. - Expenses incurred by the Center, a wholly-owned subsidiary of SEIU, are removed from the total expenses, as they are paid solely from the Center's earned income.

[Three SEIU Local 1000 logo pages and one page bearing Membership Application Enclosed stamp are omitted in printing]

[1]STEPHEN P. BERZON (SBN 46540)
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Attorneys for Defendant
Service Employees International
Union, Local 1000

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:05-CV-2198 MCE (KJM)

DIANNE KNOX; WILLIAM L. BLAYLOCK; EDWARD L. DOBROWOLSKI, JR.; KARYN GIL; THOMAS JACOB HASS; PATRICK JOHNSON; AND JON JUMPER, ON BEHALF OF THEMSELVES AND THE CLASS THEY SEEK TO REPRESENT,
Plaintiffs,

v.

STEVE WESTLY, Controller, State of California; AND CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO-CLC,
Defendants.

DECLARATION OF JEFFREY B. DEMAIN IN SUPPORT OF SEIU LOCAL 1000's OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND/OR SUMMARY ADJUDICATION

Date: August 17, 2007
Time: 9:00 a.m.
Judge Hon. Morrison C. England, Jr.
Place: Courtroom 3, 15th Floor

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[2]Jeffrey B. Demain, hereby declare as follows:

1. I am a member of the State Bar of California and am one of the counsel of record for defendant Service Employees International Union, Local 1000 (hereinafter "the Union") in the above-referenced action. I give this declaration in support of the Union's Opposition to Plaintiffs' Motion for Summary Judgment and/or Summary Adjudication.

2. Attached hereto as Exhibit A is a true and correct copy of relevant portions of the transcript of the March 7, 2007 deposition of Leeland King, in which I represented the Union. Exhibit A contains those portions of the deposition transcript cited in the Union's Response to Plaintiffs' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment and/or Summary Adjudication and in the Union's Opposition to Plaintiffs' Motion for Summary Judgment and/or Summary Adjudication, filed herewith. The handwritten changes on the transcript incorporate the errata submitted to the Court Reporter by the deponent.

3. Attached hereto as Exhibit B is a true and correct copy of relevant portions of the transcript of the March 7, 2007 deposition of Michael Harvey Baratz, in which I represented the Union. Exhibit B contains those portions of the deposition transcript cited in the Union's Response to Plaintiffs' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment and/or Summary Adjudication, filed herewith. The handwritten changes on the transcript incorporate the errata submitted to the Court Reporter by the deponent.[1]

4. Attached hereto as Exhibit C is a true and correct copy of relevant portions of the transcript of proceedings before the Court on November 4, 2005 at the hearing on plaintiffs' request for a preliminary injunction, in which I represented the Union. Exhibit C contains those portions of the transcript cited in the Union's Opposition to Plaintiffs' Motion for Summary Judgment and/or Summary Adjudication, filed herewith.

[3]I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on July 31, 2007.

/s/
Jeffrey B. Demain

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[1] Pursuant to Local Rule 5-133(j), the Union is lodging copies of the entire transcripts of Mr. King's and Mr. Baratz's depositions with the Court.

[1][EXHIBIT A]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

No 2:05-CV-02198 MCE KJM

DIANNE KNOX, *et al.*, ON BEHALF OF THEMSELVES
AND THE CLASS THEY REPRESENT,
Plaintiffs,

v.

STEVE WESTLY, Controller, State of California, et al,
Defendants.

CERTIFIED COPY

Deposition of
LEELAND KING
Wednesday, March 7, 2007

Reported by: MARY R. GALLAGHER, CSR #10749
[Logo omitted in printing]

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[21][BY MR. YOUNG]

Q. Didn't I understand you to say that nonmembers automatically get the 50-percent reduction?

[BY MR. KING]

A. I did not say that.

Q. Okay. My mistake. Let's go through—why don't we go through all six categories pre-imposition of the special assessment?

A. Okay. I will start with members pre-imposition of the special assessment under $4500 a month gross salary. Their calculation would be 1 percent of gross salary. If they were under $4500 and had a political objection, it would be 1 percent times gross salary minus 50 cents.

Q. And by—

A. I'm sorry. That is actually incorrect.

Q. Is it?

A. It is incorrect.

Q. Okay.

A. If you have a political objection as a member, you still pay the full amount of your dues, but it is—that portion is not forwarded to their political PAC. They pay the same amount of dues.

Q. So what happens to that?

A. It stays in the general fund.

Q. Oh, okay. And that PAC contribution, is that for—just so this is clear on the record, is that for [22]direct contribution to candidates, that's 50-cents per person?

A. Not necessarily. There are two PACs established by Local 1000.

Q. Why don't you describe those PACs for us?

A. There's an issues PAC and a candidate PAC.

Q. Okay. And so the candidate PAC contributions are made to specific candidates from that PAC; is that correct?

MR. DEMAIN: Objection. Lack of foundation.

BY MR. YOUNG:

Q. Why don't you tell me—can you answer the question?

A. I'm not involved in the administration of the PAC. They hire—they engage an outside law firm to administer the bookkeeping of the PAC.

Q. Okay. Why don't we continue with the due structure? I'm sorry for that.

A. So a member over $4500 a month would be capped at $45. Now, I'll go to a nonmember under $4500—

Q. Just to go back quickly, I don't want to forget this: And the member over $4500—$4500 a month who pays $45 can also object to the political spending and 50-cents stays in the general fund?

A. That's correct.

[23]Q. Okay. Now, you're going on to the nonmember?

A. Nonmember under $4500 a month would be 1 percent times their gross salary times—and I'm going from memory, times 99.1 percent. If they—if that same individual had a political objection—

Q. I'm sorry?

A. A political objection, the amount would be reduced by 50 cents.

Q. Okay. Can you—okay. And that's under 4500 a year still?

A. A month.

Q. A month, excuse me. Yes, thank you. So it's one—so the political objector 45—under $4500 a year pays 1 percent of gross times 99.1 percent minus 50-cents?

A. Incorrect, because you said "per year."

Q. I'm sorry. Per month, yes. I apologize.

A. The mathematical formula would be .01 times gross salary times 99.1—

Q. Minus 50-cents?

A. —minus 50 cents if they were a political objector.

Q. I'm trying to understand, why does the nonmember, non-political objector, why is only 99.1 percent—why does a nonmember non-objector, why is it [24]only 99.1 percent?

MR. DEMAIN: Objection. Lack of foundation.

BY MR. YOUNG:

Q. Do you know?

MR. DEMAIN: You can answer if you know.

THE WITNESS: Yes. There is a portion of the expenditures of Local 1000 that are attributable to being a member itself, like death benefits.

BY MR. YOUNG:

Q. Okay.

A. So we extract those totals from their total expenditures.

Q. Thank you. Okay. Let's go on to the nonmember who's making over 4500 a month, those are the two categories left, right?

A. Nonmember over $4500 a month would be 99.1 percent times $45 for their monthly dues. And if they happen to be a political objector, there would be an additional reduction of 50 cents a month.

Q. Okay. And for the nonmember who objects under Hudson, H-u-d-s-o-n, Mr. King, do I have to explain that? I think we all know what it means except for the Court Reporter and she doesn't have to.

A. Go ahead.

[25]Q: Go ahead.

A. What I'll call a Hudson objector under the gross monthly salary of $4500 a month, their fees would be 1 percent times their gross salary times 56.35 percent minus the political contribution of 50 cents.

For the Hudson objector whose gross salary exceeds $4500 a month, it would be $45 times 56.35 percent, minus the political deduction of 50 cents.

Q. Okay. I appreciate your ability to put things into something that's much more readable than in charts. Thank you.

Now that we discussed the period prior to the imposition, let's discuss the dues structure for the period of the special assessment.

A. Would you like it in the same format?

Q. I think that would be easier for all of us.

A. Okay.

Q. Thank you sir.

A. I'll start with members under—who have a gross monthly salary under $4500 a month. Their formula would be .0125 times gross salary and if they had a political—well, it would still be that amount.

Q. Okay.

A. If that member had a gross salary in excess of $4500 a month, it would be $45 plus .0025 times their [26]gross monthly salary.

Q. Okay. Let's go on to nonmembers, then.

A. Nonmembers who don't have a Hudson objection that are under $4500 a month salary, their calculation would be .0125 times their gross monthly salary times 99.1 percent. And if they had a political deduction, that amount would be further reduced.

Q. Is that 50-cents or is it—was it more?

A. Which period of time, again, are we talking about?

Q. During the period of the special assessment.

A. So September '05 to December '06, it changes. It went from 50 cents a month to $6.70 a month.

But for clarification, it wasn't $6.70 during that whole special assessment period. I'm going from memory, but I believe the—it went from 50 cents to $6.70, I believe, in March of '06.

Q. And that was—okay. Until the end of the year?

A. Yes.

Q. Why was it changed?

MR. DeMAIN: Objection. Lack of foundation.

BY MR. YOUNG:

Q. Do you know why it was changed?

A. No.

[27]Q. Who ordered—were you responsible for instituting the change as the chief financial officer?

A. Yes.

Q. Who directed you to make the change?

A. I believe there was some communication from the leadership of Local 1000 talking about the change and the effective date. I don't specifically recall which of the—their leadership, whether it was Cathy Hackett or Jim Hard.

Q. Was it—can you narrow it down. Was it one of those two people that instructed you to make the change?

A. I would believe it would have to be one of those two.

Q. And did they offer any explanation for the change?

A. I don't recall. I'm sure that there was something in writing informing us of the change, the accounting department.

Q. Okay. Let's talk about nonmembers who receive more than $4500 a month in gross salary.

MR. DeMAIN: I think we're talking about objectors at this -- no, I'm sorry. My mistake.

THE WITNESS: So we're talking about non-objecting/nonmembers—

[28]BY MR. YOUNG:

Q. Correct.

A. —over $4500 a month, their computation would be $45 times 99.1 percent, plus .0025 times their gross monthly salary, times 99.1 percent. And if they happen to be a political objector, minus the applicable political contribution for that period of time.

Q. 50-cents until March of 2006 and $6.70 thereafter?

A. Correct.

Q. Okay. Let's talk about objecting nonmembers if we could?

A. Objection nonmembers under $4500 a month gross salary would be gross salary times .0125 times .5635 percent, minus the political donation.

Q. And by—let's just clarify. For political donation for this entire period we're talking about 50-cents—excuse me.

For the period after August of 2005, but not including August 2005, we're talking about 50-cents through February of 2006 and $6.70 from March until December 2006 inclusive, correct?

A. Correct. If my recollection of March is correct.

Q. Would it be fair to say that sometime in the [29]early party of 2006—I think you could say with assurance then that sometime in the early part of 2006 the political contribution changed from 50-cents to $6.70.

A. Yes.

Q. Okay. Probably March, correct, to the best of your recollection?

A. To the best of my recollection.

Q. I think that's adequate for our purposes here. I appreciate your desire to be completely accurate. Okay.

So for objecting nonmembers over $4500 a month?

A. The calculation would be as follows: $45 times 56.35 percent, plus .0025 times gross monthly salary, times 56.35 percent, minus the political contribution.

MR. YOUNG: Let's go off the record for a minute.

(Off the record from 11:30 a.m. to 11:32 a.m.)

MR. YOUNG: Okay. We'll be back on the record.

(Plaintiffs' Exhibit 5 was marked for identification.)

BY MR. YOUNG:

Q. Mr. King, take a look at that Exhibit 5. When you've had a chance to fully look at it, let me know.

A. Okay.

* * * *

[32]A. For the entire period of time?

Q. Yes sir—

MR. DEMAIN: I'm going to object as beyond the scope here.

BY MR. YOUNG:

Q. Please, answer the question.

A. We haven't obviously closed the book for the year ending December 31, '06. But if I recall, it probably is coming to a little more than the $12 million that's stated there.

Q. And of that $12 million, how much of that was taken from nonmembers?

MR. DeMAIN: Objection. Beyond the scope.

THE WITNESS: I'd have to do an analysis, because that isn't easily discernible from the financial statements. You have to go through an analysis of the reports from the State Controller's department.

BY MR. YOUNG:

Q. Fair enough. Was--strike that.

Were the funds realized from the special assessment kept in a special subrogated fund by Local 1000?

MR. DeMAIN: Objection. Beyond the scope.

THE WITNESS: By a special segregated fund, I [33]take it you're asking in terms of separate checking account or bank account?

BY MR. YOUNG:

Q. Yes, sir.

A. No.

Q. So—okay. Were any portion of the funds realized from the special assessment put in a segregated fund?

MR. DeMAIN: Objection. Beyond the scope.

THE WITNESS: In terms—if you're asking about the separate bank account, no, but was there an accounting of the revenues separately from their normal dues and fees, yes.

BY MR. YOUNG:

Q. Okay. In what way was it—there was a—in what way was there special accounting?

MR. DeMAIN: Same objection.

THE WITNESS: I believe on their financial statements we gave accounting recognition as a separate line item for the special assessment revenues.

BY MR. YOUNG:

Q. Okay. And—okay. And that would have been for the year 2005 only because you haven't yet closed the books on 2006, or was that a monthly thing you did?

A. Monthly.

[34]Q. Okay.

MR. YOUNG: Let's go off the record, briefly, if we can.

(Off the record from 11:45 to 11:50 a.m.)

MR. YOUNG: Back on the record.

Q. Mr. King, in an off-the-record discussion with counsel you mentioned that you would like to clarify a point, that you misspoke earlier.

A. Yes, it had to do with those involved mathematical formulas for the various members, those would all remain true, but after I responded and we were onto another question, I realized that the period of time which you phrased the question spanned more than one fee payer year. So that percentage that I kept quoting for objector, or a Hudson objector—

Q. Sure.

A. —that would have only applied to the first year, 2005.

MR. DeMAIN: Can you say the percentage?

THE WITNESS: The 56.35 percent that subsequently changes on July 1 of '06. And that—so that calculation would be the same, but you would substitute the new germane objecting percentage.

BY MR. YOUNG:

Q. Okay. Let's go ahead and—I just happen to [35]have what I think is your 2006 Hudson—

MR. YOUNG: Let's go ahead and mark this as Number 6.

(Plaintiffs' Exhibit 6 was marked
for identification.)

BY MR. YOUNG:

Q. Okay. Mr. King, we marked deposition Exhibit Number 6. Why don't you go ahead and identify that for the record.

A. This is the Hudson notice for the fee payer year July 1, '06, through June 30th, '07.

Q. Now, is there a number in here that is the one that was applied to the reduced percentage for objecting nonmembers after July 1st, 2006?

A. Yes, but with modification.

Q. Please explain, sir.

A. Okay. On Page 4 of this exhibit under the chargeable expense column you'll see the percentage 68.80 percent. It would be on the right-hand side.

Q. This would be Bates number Union 00941?

A. That is correct.

Q. For the record, let's go ahead and clarify this. This is Bates stamp Union 00938 through -956.

Okay, Mr. King, continue please.

A. So that would be the stated chargeable [36]percentage that would be applicable to a Hudson objector.

Q. Uh-huh.

A. The percentage that we actually used for that class of people was actually lower than this amount.

Q. What was it?

A. I'm going from memory since I don't have my version that I've annotated with, but I believe it was approximately 66.3 percent.

Q. What accounts for the reduction?

MR. DeMAIN: Objection. Beyond the scope. And lack of foundation, but you can answer if you know.

THE WITNESS: What accounts for the reduction is that if you look two lines above on the Fight Back Fund expense, the chargeable expenses, we ended up taking a number lower than that in figuring this calculation.

BY MR. YOUNG:

Q. Well, now that we have this in front of us, let's talk about this document a little, if we could. It looks like—and I'm using very rough figures here, but for purposes of this notice, deposition Exhibit Number 6 the 2006 Hudson notice you treated about 80 percent of the Fight Back Fund as non-chargeable—excuse me, not 80 percent, 75 percent, roughly. And about 25 percent as chargeable. Can that be—

* * * *

[59]PENALTY OF PERJURY

I, the undersigned, hereby certify that I have read the foregoing deposition, that I know the contents thereof, and I declare under penalty of perjury that the foregoing is true and correct and that there are:

(check one) ____NO CORRECTIONS

_X_ CORRECTIONS PER ATTACHED

Executed on this 28th day of March, 2007, at Sacramento, California.

/s/
LEELAND KING

[Certificate of Certified Shorthand Reporter omitted in printing]

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Attorneys for Defendant
Service Employees International
Union, Local 1000

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:05-CV-2198 MCE (KJM)

DIANNE KNOX; WILLIAM L. BLAYLOCK; EDWARD L. DOBROWOLSKI, JR.; KARYN GIL; THOMAS JACOB HASS; PATRICK JOHNSON; JON JUMPER; AND R. PAUL RICKER, ON BEHALF OF THEMSELVES AND THE CLASS THEY SEEK TO REPRESENT,

Plaintiffs,

v.

STEVE WESTLY, Controller, State of California; AND CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO-CLC,

Defendants.

DECLARATION OF LEE KING IN SUPPORT OF SEIU LOCAL 1000's OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND/OR SUMMARY ADJUDICATION

Date: August 17, 2007
Time: 9:00 a.m.
Judge: Hon. Morrison C. England, Jr.
Place: Courtroom 3, 15th Floor

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[2]I, Lee King, hereby declare as follows:

1. I am currently employed by the California State Employees Association ("CSEA") as the Chief Financial Officer. I have been employed in this capacity since May 2004. My responsibilities include serving in this capacity for Service Employees International Union, Local 1000 (hereinafter "Local 1000" or "the Union"). I give this declaration in support of the Union's opposition to plaintiffs' Motion for Summary Judgment And/Or Summary Adjudication in the above-captioned case.

2. I have personal knowledge of the process for collecting fees from nonmembers and the amounts of those fees because I supervise the collection of those fees and have custody of the financial records governing those fees.

3. During the Summer of 2005, the legislative bodies within the Union debated and passed a temporary Union dues increase (hereinafter the "temporary increase"), equal to 0.0025, or 0.25%, of employees' gross wages. This increased the dollar amount paid by nonmembers accordingly, since the fair share fee

is a percentage of membership dues, but it did not increase the fair share fee as a percentage of membership dues. The increase went into effect with the fee deduction at the end of September 2005.

4. The temporary increase for fee-paying nonmember *objectors* was 0.001409 times monthly salary, i.e., 0.1409 percent of monthly salary. This figure—0.001409 times monthly salary, or 0.1409 percent of monthly salary—is derived by taking the *Hudson* objector chargeable rate of 56.35 percent of Union dues for the fee year July 2005 through June 2006, as determined in the Union's June 2005 *Hudson* notice on the basis of the Union's actual expenses in calendar year 2004, and multiplying it by the temporary increase in Union dues, i.e., 0.25 percent of monthly salary. The nonmember *objector* chargeable rate of 56.35 percent of Union dues changed in July 2006, when the rates applicable in the June 2006 *Hudson* notice went into effect. Thus, the actual reduced agency fee charged to nonmember *objectors* from the inception of the temporary increase at the end of September 2005 through the end of June 2006 included only 56.35 percent of the 0.25 percent of monthly salary temporary increase on Union dues charged to Union members, because the agency fee is a percentage of Union dues.

[3]5. The temporary increase for fee-paying nonmember *nonobjectors* was 0.0024775 times monthly salary, i.e., 0.24775 percent of monthly salary. This figure—0.0024775 times monthly salary, or 0.24775 percent of monthly salary—is derived by taking the *Hudson* nonobjector rate of 99.1 percent of Union dues for the fee year July 2005 through June 2006, as determined in the Union's June 2005 *Hudson* notice on the basis of the Union's actual expenses in calen-

dar year 2004, and multiplying it by the temporary increase in Union dues, i.e., 0.25 percent of monthly salary.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Sacramento, California on July 26, 2007.

/s/
Lee King

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CASE NO. 2:05-cv-02198 MCE KJM

DIANNE KNOX; *et al.*, ON BEHALF OF THEMSELVES AND THE CLASSES THEY REPRESENT,
Plaintiffs,

v.

STEVE WESTLY, Controller, State of California; *et al.*,
Defendants.

PLAINTIFFS' STATEMENT OF GENUINE ISSUES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

HEARING DATE: Friday, 17 August 2007
TIME: 9:00 a.m.
COURTROOM OF JUDGE ENGLAND,
COURTROOM 3, 15TH FLOOR

Plaintiffs Dianne Knox, *et al.*, on behalf of themselves and the classes they represent ("the Employees"), by their undersigned counsel, and pursuant to Local Rule 56-260(b), E.D.CAL., submit their Statement of Genuine Issues in Opposition to Defendant Service Employees International Union, Local 1000's Motion for Summary Judgment (Clerk's Docket No. 103), as follows:

GENERAL DISPUTES

In order to avoid repetitious **DISPUTES** which might confuse the record, the Employees note that Defendant Service Employees International Union, Local 1000 ("Local 1000"), in an apparent [2]effort to control the terms of the dispute, repeatedly uses inaccurate and/or value-laden terms to offer "facts" in support of its instant motion. Those statements fall into three general categories:

First, Local 1000 repeatedly refers to its agency fee requirement as "fair share," Clerk's Docket No. 103 at ¶¶ 2, 3, 5, 6, 10-12, 14, 19-21, 23-25, 27, a term to which the Employees take exception, since it is—from their perspective—neither "fair" *ab initio* nor the appropriate "share." The Employees therefore respectfully **DISPUTE** Local 1000's euphemistic characterization of its forced union dues and/or agency fees as a "fair share fee," and have substituted the term "agency fee" wherever "fair share fee" appears.

Second, Local 1000 repeatedly inaccurately characterizes the nature of the transaction by asserting that the Employees "pay" agency fees to Local 1000. Clerk's Docket No. 103 at ¶¶ 2-6, 8-11, 13, 18-20, 23, 24, 27. In fact, union dues or agency fees are involuntarily seized from the Employees' wages pursuant to a special privilege granted pursuant to California law. CAL. GOVT. CODE § 3515.7(b). The Employees therefore respectfully **DISPUTE** that they "pay" anything to Local 1000, and have substituted the term "have involuntarily deducted from their wages" wherever "pay" appears.

Third, and finally, Local 1000 asserts that "challenges are resolved through arbitration." Clerk's Docket No. 103, ¶ 4.[1] In fact, while Local 1000's procedure is not, by its own terms, it is not "arbitration" in any meaningful sense of that word.[2] No "arbitration"—as that word is normally understood—is provided to Employees who challenge Local 1000's agency fee calculation. "Arbitration" is a product of mutual consent, and Local 1000's impartial decisionmaker process is imposed solely by and at the discretion of Local 1000. Cases are legion where the courts have affirmed this most elementary principle. **See** *AT & T Technologies v. CWA*, 475 U.S. 643, 648-49 (1986) (reaffirming the principle that "arbitrators derive their authority to resolve disputes only [3]because the parties have agreed in advance to submit such grievances to arbitration," **quoting** *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1963)); *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299, 1304 (9TH CIR. 1994) (same) (arbitration agreement requires "knowing agreement to arbitrate . . . disputes"); **see also** Elkhouri & Elkhouri, *How Arbitration Works*, 3d ed., p. 26 ("Fundamentally, arbitration has been and still is a product of private **contract** . . . .") (emphasis added). Here, there is no contract between nonmember Employees and Local 1000. There can be no "arbitration." The Employees therefore respectfully **DISPUTE** Local 1000's inaccurate characterization of its "impartial decisionmaker" process as "arbitration," and have substituted "impartial decisionmaker process" for "arbitration" where it occurs.

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[1] Other unions have used this phrase in an apparent attempt to mislead courts into investing the procedure with regard to which it is not due. **See** *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 875 (1998) (union attempting to impose an exhaustion requirement); **see also** *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807, 815-16 (9TH CIR. 1997) (reversing district court ruling that "other relief had to be arbitrated").

[2] However, it apparently satisfies the "impartial decisionmaker" requirements of *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986).

With these qualifications and corrections, the facts (though not the legal conclusions) stated in ¶¶ 1-26 of Defendant Service Employees International Union, Local 1000's Motion for Summary Judgment (Clerk's Docket No. 103) are **UNDISPUTED**, and ¶ 27 is **DISPUTED** as set forth below.

DEFENDANT'S ITEMIZED FACTS

1. Plaintiffs are California state employees who are represented by Defendant Service Employees International Union, Local 1000 ("SEIU Local 1000" or "Union") in their employment relations with the state employer.

2. Plaintiffs have chosen not to become members of the Union (or to resign their Union membership), and thus do not pay membership dues to the Union. Instead, as nonmembers, they [have involuntarily deducted from their wages] a[n agency] fee to the Union.

3. The Union issues to its nonmember [agency] fee payers a *Hudson* notice every June. A given [agency] fee is in effect from July 1 until June 30 of the following year (the "fee year"), at which point the [agency] fee set forth in the Union's next *Hudson* notice goes into effect.

4. As the Union's *Hudson* notice makes clear, for a specified period of time after the issuance of the *Hudson* notice, nonmembers can submit an objection to paying for nonchargeable activities and thus [have involuntarily deducted from their wages] the reduced rate during the upcoming fee year. As the notice also makes clear, during that same specified period after issuance of the *Hudson* notice, nonmembers can also challenge the Union's calculation of its chargeable and non-[4]chargeable expenses, in which case the reasonably disputed portion of their fee will be held in escrow pending the resolution of any such challenge. Such challenges are resolved through [an impartial decisionmaker process].

5. The Union's *Hudson* notice also makes clear that, if a nonmember fails to submit to the Union a timely objection to paying for nonchargeable activities or a timely challenge to the Union's calculation of its chargeable and nonchargeable expenses, the nonmember will be charged the full [agency] fee, which includes a *pro rata* portion of those non-chargeable expenditures.

6. In addition to informing nonmembers of their rights to object to paying for nonchargeable activities and to challenge the Union's calculation of its chargeable and nonchargeable expenses, the notice also (1) explains the basis for the calculation of the [agency] fee; (2) discloses to nonmembers the audited financial information underlying that calculation;

and (3) sets forth the procedures to be followed in exercising the rights to object and/or challenge.

7. The Union's June 2005 *Hudson* notice, which covered the fee year July 1, 2005 through June 30, 2006, was sent to all nonmembers in June 2005. The Union's June 2006 *Hudson* notice, which covered the fee year July 1, 2006 through June 30, 2007, was sent to all nonmembers in June 2006. The Union's June 2007 *Hudson* notice, which covered the fee year July 1, 2007 through June 30, 2008, was sent to all nonmembers in June 2007.

8. The Union's June 2005, June 2006, and June 2007 *Hudson* notices provided fee payers with financial disclosure (audited statements of chargeable and non-chargeable expenditures) that set forth the major categories of the Union's expenses, based on the Union's actual expenses from the most recent previously-audited calendar year (2004, 2005, and 2006, respectively). That financial disclosure classified those expenditures among chargeable, non-chargeable, and partially chargeable/ partially non-chargeable classifications, stating the chargeable and nonchargeable amounts for each such category of expenditure.

9. The financial disclosure presented in the Union's June 2005, June 2006 and June 2007 *Hudson* notices included categories of expenditure for non-chargeable expenditures, including certain types of political expenditures. That financial disclosure specifically identified the expense categories of "Political Education," "Political Activity and [Union Political Action Committee] Activities," [5]"Screening and Watching Legislation," and "Legislative Activities Not Tied to Particular Legislation" as being fully or partially non-chargeable to objecting fee payers. Further, the Union's June 2006 and June 2007 *Hudson* notices

included audited financial disclosure regarding the expenditures of the "Fight Back Fund."

10. The Union's June 2005 *Hudson* notice informed all nonmembers that the Union and its auditors had determined that 56.35 percent of the Union's expenditures in 2004 were devoted to chargeable expenses. That notice therefore informed all nonmembers that the [agency] fee for the fee year covered by the notice (July 1, 2005 through June 30, 2006) would be set at no more than 99.1 percent of regular membership dues for fee payers who did not submit a timely objection to paying for non-chargeable expenditures in response to that notice, and at no more than 56.35 percent of regular membership dues for fee payers who submitted such a timely objection.

11. The Union's June 2005 *Hudson* notice informed all nonmembers of their right to object to paying for non-chargeable expenditures (and thereby [have involuntarily deducted from their wages] a[n agency] fee of not more than 56.35 percent of regular membership dues), and of the procedure for submitting such an objection.

12. The Union's June 2005 *Hudson* notice informed all nonmembers that membership dues (upon which the [agency] fee is based) "are currently 1.0 % of monthly gross salary and are presently capped at a maximum of $45 per month."

13. The Union's June 2005, June 2006, and June 2007 *Hudson* notices informed all nonmembers of the then-current amount of membership dues and stated expressly that "[d]ues are subject to change without further notice to fee payers."

14. During the Summer of 2005, the legislative bodies within the Union debated and passed a temporary dues increase, equal to 0.0025, or 0.25%, of employees' gross wages. This increased the dollar amount paid by nonmembers accordingly, since the [agency] fee is a percentage of membership dues, but it did not increase the [agency] fee as a percentage of membership dues.

15. The temporary increase took effect at the end of September 2005.

16. The money raised by the temporary dues increase has been referred to as the "Fight Back Fund."

[6]17. The Union's independent auditors conducted separate audits of the financial statements of the "Fight Back Fund" prior to the issuance of the Union's June 2006 and June 2007 *Hudson* notices.

18. The Union's June 2006 *Hudson* notice informed all nonmembers of their right to object to paying for non-chargeable expenditures, which included certain non-chargeable expenditures relating to the "Fight Back Fund," and of the procedure for submitting such an objection.

19. The Union's June 2006 *Hudson* notice informed nonmembers that if they did not submit a timely objection to paying for nonchargeable expenditures, they would [have involuntarily deducted from their wages] a[n agency] fee of no more than 99.1 percent of membership dues, whereas if they submitted a timely objection they would [have involuntarily deducted from their wages] a reduced [agency] fee of no more than 68.8 percent of membership dues, in the coming fee year.

20. In response to the Union's June 2005 *Hudson* notice, 3,351 nonmembers submitted objections to paying for non-chargeable expenses and/or challenges to the Union's calculation of the [agency] fee. This constituted 11.83 percent of all nonmembers of the Union. In response to the Union's June 2006 *Hudson* notice, 3,094 nonmembers submitted objections to paying for nonchargeable expenses and/or challenges to the Union's calculation of the [agency] fee. This represented 10.50 percent of all nonmembers of the Union.

21. The Union's June 2006 and June 2007 *Hudson* notices included the audited expenditures made from the "Fight Back Fund" during the most recently-audited prior year (2005 and 2006, respectively) in the calculation of the [agency] fee for the fee year covered by each of those notices.

22. The dues and fees increase for the "Fight Back Fund" terminated at the end of December 2006.

23. The Union's June 2007 *Hudson* notice informed all nonmembers of their right to object to paying for non-chargeable expenditures, and of the procedure for submitting such an objection.

24. The Union's June 2007 notice informed nonmembers that if they did not submit a timely objection to paying for non-chargeable expenditures, they would [have involuntarily deducted from their wages] a[n agency] fee of no more than 99.3 percent of membership dues, whereas if they [7]submitted a timely objection they would [have involuntarily deducted from their wages] a reduced [agency] fee of no more than 60.3 percent of membership dues, in the coming fee year.

25. Because the temporary increase for the "Fight Back Fund" terminated at the end of December 2006, the [agency] fee to be collected under the Union's June 2007 *Hudson* notice does not include any money for the "Fight Back Fund".

26. Plaintiffs' lawsuit was filed on November 1, 2005.

27. On October 31, 2006, the Court issued an Order ("Order") in this case granting plaintiffs' motion to certify two classes of plaintiffs. Both classes consist of nonmembers of the Union who are [agency] fee payers. The first is a class of *Hudson* objectors. Order at 9:13-17. The second is a class of nonobjectors. Order at 9:19-22.

PLAINTIFFS' RESPONSE: The Employees **DISPUTE** the factual accuracy of this statement to the extent that it misstates the Court's ruling, which speaks for itself, as follows:

> The Court finds that the named Plaintiffs are adequate representatives of the class of individuals who pay compulsory fees to CSEA who are not members and who have, at one time or another, specifically objected to the use of their agency fees for politics or [8]other non-bargaining activities. The Court further finds that Plaintiff Conover is an adequate representative of the class of individuals who pay compulsory fees to CSEA who are not members and who have not at any time objected to the use of their agency fees for politics or other non-bargaining activities.

Clerk's Docket No. 81.

DATED: 31 July 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. James Young, counsel for Plaintiffs, hereby certify that I electronically filed with the Clerk of the Court the foregoing **Plaintiffs' Statement of Genuine Issues In Opposition to Defendant Service Employees International Union, Local 1000's Motion for Summary Judgment,** using the CM/ECF system which will send notification of such filing to Defendants' counsel, this 31st day of July, 2007.

/s/ W. James Young
W. James Young

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 10-1121

IN THE
Supreme Court of the United States

DIANNE KNOX; WILLIAM L. BLAYLOCK;
ROBERT A. CONOVER; EDWARD L. DOBROWOLSKI, JR.;
KARYN GIL; THOMAS JACOB HASS; PATRICK JOHNSON;
AND JON JUMPER, ON BEHALF OF THEMSELVES
AND THE CLASSES THEY REPRESENT,
Petitioners,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 1000,
Respondent.

**On Writ of *Certiorari* to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. *Teachers Local No. 1 v. Hudson* held that "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake, ... dictate that the potential objectors be given sufficient information to gauge the propriety of the union's [agency] fee" extracted from nonunion public employees. 475 U.S. 292, 306 (1986).

May a State, consistent with the First and Fourteenth Amendments, condition employment on the payment of a special union assessment intended solely for political purposes—a statewide ballot initiative campaign—without first providing a *Hudson* notice that includes information about that assessment and provides an opportunity to opt out of supporting those political exactions?

2. *Lehnert v. Ferris Faculty Ass'n* held that "the State constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation." 500 U.S. 507, 522 (1991) (opinion of Blackmun, J.); *accord id.* at 559 (opinion of Scalia, J.) (concurring as to "the challenged lobbying expenses").

May a State, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of agency fees for purposes of financing a union's opposition to public ballot initiatives?

PARTIES TO THE PROCEEDINGS BELOW

Defendant Service Employees International Union, Local 1000, was identified by its earlier name—California State Employees Association, Local 1000, Service Employees International Union, AFL-CIO, CLC—in the caption of the original Complaint. Record ("R.") 1. Its correct name is stated in the caption herein.

In addition to the parties listed in the caption, the other parties to the proceedings below were:

1. the Controller of the State of California (in his official capacity only); Steve Westly held that office at the outset of this case, and the office is currently held by John Chiang, automatically substituted as a Defendant pursuant to Rule 25(d), Fed. R. Civ. P.; and

2. R. Paul Ricker, an individual, originally named as a Plaintiff, who was dismissed upon stipulation. R. 43.

CORPORATE LISTING

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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IN THE

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No. 10-1121

DIANNE KNOX; WILLIAM L. BLAYLOCK;
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Petitioners,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 1000,
Respondent.

On Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, Petition ("Pet.") Appendix ("App.") A at 1a, is reported at 628 F.3d 1115 (9th Cir. 2010). The decision of the United States District Court for the Eastern District of California, Pet. App. B at 50a, granting in part Plaintiffs' Motions for Summary Judgment and denying in part and granting in part Defendant's Motion for Summary Judgment, is not officially reported but appears at 2008 WL 850128, 183 L.R.R.M. (BNA) 3[illegible]32 (E.D. Cal. 2008).

JURISDICTION

The Ninth Circuit entered its judgment on December 10, 2010. The Petition for Writ of Certiorari was timely filed on March 10, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The **First Amendment to the United States Constitution** provides in pertinent part that "Congress shall make no law ... abridging the freedom of speech, ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend I.

The **Fourteenth Amendment** provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The state statute involved is the Ralph C. Dills Act, Cal. Gov't Code § 3512 *et seq.*, specifically §§ 3513(k) and 3515. *See* Pet. App. E at 77a.

STATEMENT OF THE CASE

I. The Facts

Background: Petitioners Dianne Knox *et al.*, and the 28,000 class members they represent ("Nonmembers"), are employees of the State of California who are not members of their monopoly bargaining representative, Respondent Service Employees International Union, Local 1000 ("SEIU"). California law and SEIU's contracts with the State require that the Nonmembers pay compulsory agency fees to the

SEIU as a condition of their employment. Cal. Gov't Code § 3513(k); Pet. App. E at 77a.

The Hudson Notice: Because union fees typically include more than collective bargaining costs, this Court in *Teachers Local No. 1 v. Hudson* determined that transparency is required to enable nonmembers to object and avoid subsidizing union political and other nonbargaining activities. It held that, as a constitutional precondition to collecting agency fees, "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake, ... dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee." 475 U.S. 292, 306 (1986).

In June 2005, SEIU sent its annual *Hudson* notice to the Nonmembers. Joint Appendix ("JA") 96-151. SEIU set the agency fee for July 1, 2005, through June 30, 2006, at 56.35% of dues for those nonmembers who objected within thirty days to paying anything more than the cost of bargaining. Nonmembers who did not object or who resigned subsequent to the notice were subject to deductions of 99.1% of dues from their wages. SEIU's *Hudson* notice did not indicate that later a temporary assessment would be added to the 2005-06 dues and fees. Pet. App. B at 52a-53a.

The Special Assessment: The years 2003-2006 were a time of intense political controversy in California. In 2003, Governor Gray Davis was stripped of his office in an unprecedented recall election and Arnold Schwarzenegger was installed as Governor. During the summer of 2005, Governor Schwarzenegger called for a special statewide election to consider four ballot initiatives designed, *inter alia*, to limit the power of public-sector unions to collect dues and agency fees for political activities without each employee's permission, and to permit the Governor, under specific circumstances, to reduce appropriations, including employee compensation and state contracts.

Shortly after the expiration of the thirty-day period for nonmembers to object under the June 2005 *Hudson* notice, SEIU's legislative bodies began discussing an "Emergency Temporary Assessment" to fund opposition to those four ballot initiatives. Pet. App. A at 27a, 628 F.3d at 1128 (Wallace, J., dissenting); *accord id.* at 5a-6a, 628 F.3d at 1118-19. The SEIU Executive Council intended to use the assessment "'for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California.'" Pet. App. B at 53a. SEIU also warranted that "the fund 'will not be used for regular costs of the union—such as office rent, staff salaries or routine equipment replacement.'" Pet. App. A at 6a, 628 F.3d at 1118-19. SEIU's goal was to raise $12 million for its political campaign. *Id.* at 5a, 628 F.3d at 1118.

SEIU approved the assessment for its new "Political Fight-Back Fund" on August 27, 2005. It became effective on September 1, 2005. About August 31, 2005, SEIU informed its members and the Nonmembers about the imposition of the "temporary dues increase ... 'to defeat Propositions 76 and 75,' other future attacks on the Union pension plan, and other activities," including "'to elect a governor and legislature who support public employees and the services [they] provide.'" *Id.* at 6a, 28a, 628 F.3d at 1119, 1129. This letter "did not provide an explanation for the basis of the additional fees being imposed, and it did not provide nonmembers with an opportunity to object to the additional fees." *Id.* at 28a, 628 F.3d at 1129 (Wallace, J., dissenting).

Deduction of the assessment began with the State employees' September 2005 paychecks. The assessment increased the total compulsory fees deducted from the 28,000 Nonmembers' wages by approximately 25-33%. Pet. App. B at 62a n.6, 63a n.7. The State deducted 56.35% of the assessment from those who had objected after the June 2005 notice, and 99.1% from those who had not.

With the money garnered from its political assessment, SEIU expended funds for political activities in opposition to the November 2005 statewide ballot initiatives. This assessment forced all Nonmembers—even those who had previously objected—to make a forced loan supporting "'a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California,'" *id.* at 64a, in opposition to the ballot initiatives. *See also* R. 99 at 4, lines 14-27.

II. The Proceedings Below

On November 1, 2005, the Nonmembers filed this class-action lawsuit alleging that the collection and use of the $12 million special assessment was unconstitutional in the absence of a new *Hudson* notice and opportunity to object and opt out of paying the assessment. JA at 16-17. The Complaint sought declaratory and injunctive relief and equitable restitution for violations of the Nonmembers' rights under the First and Fourteenth Amendments and 42 U.S.C. § 1983. JA at 20-23.

The district court certified two discrete subclasses of nonmembers: (1) those "who have, at one time or another, specifically objected to the use of their agency fees for politics or other non-bargaining activities"; and (2) those "who have not at any time objected." The second subclass is represented by Plaintiff Robert Conover, who resigned from membership after adoption of the political assessment. JA at 62.

The district court entered summary judgment for the Nonmembers. R. 140: Judgment; R. 159: Amended Judgment. It found that SEIU's June "2005 *Hudson* Notice could not possibly have supplied the requisite information with which nonmembers could make an informed choice of whether or not to object to the Assessment," and that "the 2005 *Hudson* notice was inadequate to provide a basis for the Union's Assessment." Pet. App. B at 70a. The court emphasized that it "is hard to imagine any circumstances in which it could be more clear that an Assessment was passed for political and ideological purposes." *Id.* at 64a.

SEIU appealed. R. 155, 161. A three-judge panel of the Ninth Circuit reversed. Pet. App. A at 2a-16a, 628 F.3d at 1117-23. Judge Wallace dissented. *Id.* at 16a-49a, 628 F.3d at 1123-39.

First, the panel majority held it unnecessary for SEIU to provide Nonmembers with notice and opportunity to object to the political assessment, asserting that those expenses would be accounted for in the union's next annual *Hudson* notice. *Id.* at 8a-16a, 628 F.3d at 1119-23. In reaching this conclusion, the panel used what it characterized as "the normal *Hudson* balancing and reasonable accommodation test we have used in the past when deciding challenges to *Hudson* notice procedures." *Id.* at 9a, 628 F.3d at 1120 (footnote omitted). That test balances "the right of a union, as the exclusive collective bargaining representative ... to require nonunion employees to pay a fair share of the union's costs" against "the First Amendment limitation on collection of fees from dissenting employees for the support of ideological causes not germane to the union's duties as collective-bargaining agent." *Id.* at 2a, 628 F.3d at 1117.

Second, the panel majority held that "not all political expenses are automatically non-chargeable. Rather, if germane to collective bargaining, they can be chargeable just like any other expense." *Id.* at 6a-7a n.2, 628 F.3d at 1119 n.2. SEIU's expenditures to oppose Proposition 76 were held to be lawfully chargeable to the 28,000 Nonmembers because Proposition 76 purportedly "would have effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances." *Id.*, 628 F.3d at 1119 n.2.

In dissent, Judge Wallace first criticized the majority for a lack of fidelity to "the principles guiding the Court's decision" in *Hudson*, "begin[ning] from an inaccurate account of the interests at stake, and appl[ying] the procedures set forth in *Hudson* without due attention to the distinguishing facts of this case." *Id.* at 16a, 628 F.3d at 1123. Judge Wallace found "that the majority's 'reasonable accommodation test' is misguided and is inconsistent with case law we are required to follow," *id.* at 26a, 628 F.3d at 1128, because it "ignores *Hudson*'s instruction that, because employees' First Amendment interests are implicated by the collection of an agency fee, 'the procedure [must] be *carefully tailored* to minimize the infringement.'" *Id.* at 25a, 628 F.3d at 1127-28 (original emphasis), quoting *Hudson*, 475 U.S. at 302-03.

Second, Judge Wallace found that "any connection between the Union's challenge [to Proposition 76] was too attenuated to its collective bargaining agreement to be considered a chargeable expense." Pet. App. A at 43a n.4, 628 F.3d at 1135 n.4. He noted that Proposition 76 was not directly related to contract ratification or implementation, as its purpose "was to limit the annual amount of total state spending." It "would have given the Governor limited 'authority to reduce appropriations' for future state contracts, collective bargaining agreements, and entitlement programs." *Id.*, 628 F.3d at 1135 n.4. However, it *contained no* language that would have given the Governor any authority to abrogate bargaining agreements. *See* page 36 and nn.16 & 17, *infra.*[1]

SUMMARY OF ARGUMENT

Ordinarily, only the sovereign possesses the power to tax. An extraordinary exception to this power, however, is tolerated for labor unions that seek to recoup their collective bargaining expenses from nonmembers they represent. *See Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 184 (2007) (unions representing public employees given "extraordinary power," an "extraordinary benefit," "in essence, to tax government employees"); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977).

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[1] *See also* Official Voter Information Guide, http://vote2005.sos.ca.gov/voterguide/ballot_measure_summary.shtml#Prop76 (last visited Aug. 30, 2011).

This case concerns 28,000 employees forced by the State of California to make, out of their monthly wages, a multi-million-dollar political loan to SEIU. This Court's decisions protecting individuals from being forced by government to promote the political and ideological views of others require the application of strict scrutiny. Such restrictions on the core First Amendment freedoms of speech and association are unconstitutional unless they further a compelling governmental interest and must be narrowly tailored to achieve that interest.

It follows that Judge Wallace's dissenting opinion below, eschewing the "balancing and reasonable accommodation test," is correct: *Hudson*'s procedural protections do not create a balance; they create a barrier protecting against forced political speech. Therefore, the Ninth Circuit's interpretation of *Hudson* that allows the use of the Nonmembers' money, even temporarily, for SEIU's politics cannot be valid.

The "Emergency Temporary Assessment" here at issue was, by its terms, "a *Political* Fight-Back Fund" to be used "for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California." Pet. App. B at 64a (emphasis added). Moreover, SEIU warranted that the fund would "'not be used for regular costs of the union—such as office rent, staff salaries or routine equipment replacement.'" Pet. App. A at 6a, 628 F.3d at 1118-19.

Yet SEIU extracted the political assessment from the 28,000 Nonmembers without providing any additional notice or opportunity to opt out, thus depriving the Nonmembers of their right to "'*avoid the risk* that [nonmembers'] funds [would] be used, even temporarily, to finance ideological activities unrelated to collective bargaining.'" *Hudson*, 475 U.S. at 305 (emphasis added), quoting *Abood*, 431 U.S. at 244 (Stevens, J., concurring). This was an involuntary political loan. When the Ninth Circuit applied a "balancing and reasonable accommodation test," it failed in its duty to apply strict scrutiny, and improperly reversed the district court's judgment vindicating the Nonmembers' paramount First Amendment rights.

The governmental interest that sustains laws authorizing labor unions to extract fees from nonmembers begins and ends with government's interest in "labor peace and avoiding 'free riders.'" This Court has therefore limited chargeable political expenditures to those related to the "ratification or implementation of a dissenter's collective-bargaining agreement." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520 (1991). When the Ninth Circuit held that the Nonmembers could be compelled, as a condition of their public employment, to subsidize SEIU's political expenditures opposing a ballot initiative relating to laws of general application, and not to ratification or implementation of their collective-bargaining agreement, it again failed to apply these standards, or to protect the Nonmembers' paramount First Amendment interests.

This case provides the Court with the opportunity both to reaffirm that state-sanctioned involuntary political loans are inconsistent with free speech and association, and to clarify its holdings in *Hudson* and *Lehnert*. When a union increases the amount of fees it collects from nonmembers between its annual *Hudson* notices, especially when that increase is solely or primarily for political and ideological activities, the least restrictive means of protecting nonmembers' First Amendment rights mandates that the union: (1) cannot collect the increase from those nonmembers who have already objected; and (2) must not collect the increase from other nonmembers until it has ascertained their wishes by providing them with a new notice and opportunity to object and not pay the increase.

ARGUMENT

I. This Court Applies Strict Scrutiny to Laws Burdening Expressive Association and Political Speech.

A. Infringements on the First Amendment Right of Free Expressive Association Are Subject to Strict Scrutiny.

The First Amendment guarantees individuals the right to associate for the expressive purposes of "speech" and "petition[ing] the Government for a redress of grievances." U.S. Const. amend. I; *see, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-23 (1984); *Elrod v. Burns*, 427 U.S. 347, 356-57 (1976). ""The established elements of speech, assembly, association, and petition, though not identical, are inseparable."" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982), quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

"Freedom of association ... plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623. Compelling association for expressive purposes therefore runs afoul of First Amendment guarantees. *See Elrod*, 427 U.S. at 359-60 (compelling employees to associate with a political party); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 410-11 (2001) (compelling employers to associate with marketing cooperatives); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (compelling private groups to associate with individuals); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714-15 (1996) (compelling contractors to associate with a political party); *Keller v. State Bar*, 496 U.S. 1 (1990) (compelling lawyers to associate with state bars). The right to refrain from supporting the political beliefs of others is "at the heart of the First Amendment." *Hudson*, 475 U.S. at 302 n.9; *see Abood*, 431 U.S. at 236.

Infringements on the right to expressive association are subject to strict scrutiny: "the right to expressive association" may be "overridden 'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Dale*, 530 U.S. at 648, quoting *Roberts*, 468 U.S. at 623. This standard is sometimes stated as "exacting scrutiny," under which the government "interest advanced must be paramount, one of vital importance," and the "government must 'emplo[y] means closely drawn to avoid unnecessary abridgment.'" *Elrod*, 427 U.S. at 362-63, quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *see also Rutan v. Republican Party*, 497 U.S. 62, 72 (1990) (infringements on expressive association must be "narrowly tailored to further vital government interests").

The same standard applies when public employees are compelled to support financially a union as their mandatory, exclusive bargaining representative. *See Hudson*, 475 U.S. at 303 n.11; *see also Locke v. Karass*, 555 U.S. 207, 219 (2009); *Lehnert*, 500 U.S. at 519; *cf. Ellis v. Railway Clerks*, 466 U.S. 435, 455-56 (1984); *Abood*, 431 U.S. at 233-34.

Abood recognized that "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." 431 U.S. at 222; *accord Locke*, 555 U.S. at 215. The Court nonetheless held that "*important* government interests ... support the impingement upon associational freedom created by the agency shop here at issue." 431 U.S. at 225 (emphasis added); *see also id.* at 255 ("the State ... bear[s] the burden of proving that any union dues or fees that it requires of nonunion employees are needed to serve *paramount* governmental interests") (Powell, J., concurring in the judgment) (emphasis added).[3] The governmental interests that justify the infringement on employees' First Amendment rights are maintaining "labor peace" in the workplace and avoiding "free riders." *Id.* at 224. It follows that whether employees can be compelled to support any particular union activity turns upon whether these two governmental interests justify the constitutional infringement.

The Court applied this logic in *Ellis* and *Lehnert*, utilizing a three-part test, the second and third prongs of which focus on whether compelling support for union activity is narrowly-tailored to achieve the labor peace interest. *See Ellis*, 466 U.S. at 448, 455-56 (union expenses that meet the minimal requirement of being "incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues" must also pass the constitutional test of whether the expense "involve[s] additional interference with the First Amendment interests of objecting employees and, if so, whether they are nonetheless adequately supported by a government interest"); *Lehnert*, 500 U.S. at 519 (chargeable union expenses "must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's *vital policy interest* in labor peace and avoiding 'free riders'; and (3) *not significantly add* to the burdening of free speech that is inherent in the allowance of an agency or union shop") (emphasis added). The second and third prongs of the *Ellis* and *Lehnert* test are functionally identical to the compelled expressive association tests stated in *Dale*, 530 U.S. at 648, and *Elrod*, 427 U.S. at 362-63. All require a compelling or vital state interest, and that the means be least restrictive of free speech.

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[3] *Abood* relied heavily on cases regarding the freedom to associate for the purpose of advancing beliefs and ideas, such as *Elrod*. *See* 431 U.S at 233-35.

For these reasons, *Hudson* held that the procedures attendant to the collection of compulsory union dues must "be carefully tailored to minimize the infringement." 475 U.S. at 303. The Court relied upon several leading cases protecting the right of expressive association. *Id.* at 303 n.11.[4]

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[4] *Hudson* quoted *Roberts*, 468 U.S. at 623 ("Infringements on freedom of association 'may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'"); *Elrod*, 427 U.S. at

These cases establish three important principles. First, the Court has long treated compulsory unionism as a species of compelled expressive association. This is logical, for the practice compels association for the *very purpose* of expressive activities.[5]

Forcing employees to support a union as their exclusive representative for dealing with a governmental body inherently compels employees to support: (1) "speech" directed to their government employers and others; and (2) efforts to "petition the Government for a redress of grievances," ostensibly for the employees, within the meaning of the First Amendment, U.S. Const. amend. I. These activities are at the core of constitutional and democratic freedoms. *See Borough of Duryea v. Guarnieri*, ___ U.S. ___, ___, 131 S. Ct. 2488, 2495 (2011). So, too, is the freedom of individuals to choose with whom they associate for these purposes. *See Claiborne Hardware*, 458 U.S. at 911; *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294-95 (1981);

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363 ("government means must be 'least restrictive of freedom of belief and association'"); *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973) ("'[E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty'"); and *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("'Precision of regulation must be the touchstone' in the First Amendment context.") (quotations in parentheses are from *Hudson*, 475 U.S. at 303 n.11).

[5] It makes no sense to exclude compulsory unionism from this Court's line of compelled expressive association jurisprudence. There is no principled difference between compelling an expressive organization to associate with an individual—as *Dale* and *Roberts* prohibited—and in compelling an individual to associate with an expressive organization like a union. Both must necessarily be subject to the same level of scrutiny, *i.e.*, strict scrutiny.

California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972); *DeJonge v. State of Oregon*, 299 U.S. 353, 364-65 (1937).

Second, government compulsion to support a particular representative to speak to and petition government grievously infringes on the freedom of expressive association guaranteed by the First Amendment. *See United Foods*, 533 U.S. at 411 ("First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors ...."); *Elrod*, 427 U.S. at 357. This Court has repeatedly recognized as much in this context, acknowledging that "by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights." *Ellis*, 466 U.S. at 455; *accord Hudson*, 475 U.S. at 301 & n.8, 307 n.20.

Third, it follows that, like all other forms of compelled expressive association, government-compelled association with a union agent is subject to the most exacting levels of constitutional scrutiny. The infringement must be justified by a compelling or vital government interest, and be the least restrictive means for satisfying that interest. *See, e.g., Dale*, 530 U.S. at 648; *Lehnert*, 500 U.S. at 519; *Rutan*, 497 U.S. at 72; *Hudson*, 475 U.S. at 303; *Roberts*, 468 U.S. at 623; *Ellis*, 466 U.S. at 455-56; *Elrod*, 427 U.S. at 362-63.

Thus, the Ninth Circuit was wrong to apply a "balancing test" instead of the exacting test of strict scrutiny. The governmental policies at issue here, and the forced political loans mandated by SEIU and the State of California, do not meet this exacting standard.

B. This Court's Jurisprudence Regarding Compelled Speech and Political Speech Requires the Application of Strict Scrutiny.

Here, 28,000 Nonmembers are being compelled to give a multi-million dollar loan for political speech to a union that the State designated as their exclusive representative. That strict scrutiny is mandated is also demonstrated by analogous compelled-speech cases, which apply that standard to situations in which the government compels an individual or entity to promote or associate with the speech of others. *See Pacific Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 17-18 (1986) (unconstitutional for state agency to require that a utility company include a third-party newsletter in its billing envelope); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 577-78 (1995) (state law requiring that parade include group with message with which parade's organizer does not wish to associate is unconstitutional).

The reason for strict scrutiny is self-evident, because compelled political speech corrupts the political process. *See, e.g., FEC v. Mass. Citizens for Life*, 479 U.S. 238, 258-60 (1986). A practice that "compels or restrains belief and association is inimical to the process which undergirds our system of government and is 'at war with the deeper traditions of democracy embodied in the First Amendment.'" *Elrod*, 427 U.S. at 357, quoting *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 576 (7th Cir. 1972). That is why government may not "increase the speech of some at the expense of others," particularly not political speech. *Arizona Free Enter. Club's Free-*

dom Club PAC v. Bennett, ___ U.S. ___, ___, 131 S. Ct. 2806, 2821 (2011); *see id.* at 2820-22.

Moreover, "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech" and is therefore "a content-based regulation of speech." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795, 798 (1988). "Restrictions on speech based on its content are 'presumptively invalid' and subject to strict scrutiny." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, ___, 129 S. Ct. 1093, 1098 (2009), citing *Davenport*, 551 U.S. at 188.

Just last Term, this Court reaffirmed the well-established proposition that "'[l]aws that burden [financial support for] political speech are ... subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Bennett*, 131 S. Ct. at 2817, quoting *Citizens United v. FEC*, ___ U.S. ___, ___, 130 S. Ct. 876, 898 (2010) (internal quotation marks omitted). Naturally, compelling nonmembers to support political speech of others is subject to the same standard of review as restrictions on political speech. *See Abood*, 431 U.S. at 234 (that nonmembers "are compelled to make, rather than prohibited from making contributions for political purposes works no less an infringement of their constitutional rights").

Bennett is instructive, as it addressed the State of Arizona inserting itself into political campaigns by providing additional funds to publicly-financed candidates at the expense of privately-financed candidates and groups. 131 S. Ct. at 2813. In striking down that scheme, this Court reversed the Ninth Circuit's failure to apply strict scrutiny. *Id.*, citing

McComish v. Bennett, 611 F.3d 510, 513, 525 (9th Cir. 2010).

Here, as Arizona financed candidates in *Bennett*, the State of California enhances SEIU's political speech in two ways: by compelling all employees SEIU represents to pay a "tax" (agency fees), Cal. Gov't Code § 3513(k); and by involuntarily deducting the fees and assessments from the Nonmembers' wages, *id.* at § 3515.7(b) (providing for automatic deduction of union dues and agency fees by the State). The result is that 28,000 Nonmembers made a compelled multi-million dollar political loan to SEIU. This, of course, comes not only at the Nonmembers' expense, but also at the expense of individuals (including some of the Nonmembers, JA 14-15, ¶ 28) and organizations supporting the ballot initiatives that SEIU opposed.

California's conduct is even more egregious than Arizona's in *Bennett*, because the money the State gives SEIU comes directly from the Nonmembers' wages, not from general public accounts. That fact places this case squarely within the conceptual framework of the campaign-finance decisions. *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978) (applying strict scrutiny to law governing monetary contributions for speech about public ballot initiatives).

II. Temporary Political Assessments Are Not Exempt from *Hudson*'s Prophylactic Procedures.

Whenever a union imposes upon nonmembers a new financial obligation, it must adhere to *Hudson* by providing "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310.[6] These procedures allow nonmembers to *identify and opt out of paying political, ideological*, and other nonbargaining expenses.

Here, SEIU compelled 28,000 Nonmembers to pay a special assessment for opposition to ballot initiatives without a *Hudson* notice giving them the *opportunity to object to that political contribution*. It thus stripped the Nonmembers of their First Amendment right to "avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Id.* at 305, quoting *Abood*, 431 U.S. at 244.

The panel majority erred in holding that SEIU's June 2005 *Hudson* notice covering ordinary dues collections sufficed to cover the special political assessment commencing in September 2005, after that notice's "opt out" period had expired. Pet. App. A at 10a-15a, 628 F.3d at 1119-23. The June 2005 notice only concerned regular dues and fees. It gave no notice concerning the later political assessment, much less an opportunity to make an informed objection to paying that assessment. JA 96-151.

The lack of notice and opportunity to object is even more critical as to the non-objecting employees in the subclass of Nonmembers who—while they failed to object under SEIU's June 2005 *Hudson* notice—may well have objected upon learning that SEIU intended to increase their financial burden by 25%-33% and use that increase for political purposes, as Plaintiff Conover did. JA at 8, ¶ 8(b). That SEIU failed to provide such notice and procedures when it imposed this compelled political contribution means that it forced Nonmembers to provide an involuntary political loan in violation of their First Amendment rights.

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[6] Insofar as it allows pre-hearing collection of agency fees, *Hudson* substantially departs from this Court's repeated holdings that an "essential principle of due process is that a deprivation of life, liberty, or property 'be *preceded* by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (emphasis added), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

The panel's conclusion that Nonmembers had to wait a year, until the issuance of the next year's *Hudson* notice, to object to the special assessment is untenable. This forced the Nonmembers to make a multi-million dollar political loan to SEIU, in blatant disregard of the Nonmembers' own political beliefs and ideologies. *Hudson* recognizes that a "forced exaction followed by a rebate equal to the amount improperly expended is ... not a permissible response to the nonunion employees' objections." 475 U.S. at 305-06. Such a rebate policy permits unions to obtain "'an involuntary loan for purposes to which the employee objects.'" *Id.* at 304, quoting *Ellis*, 466 U.S. at 444. Yet, such a rebate policy is precisely what the Ninth Circuit adopted with respect to the SEIU's political assessment, *i.e.*, that the Nonmembers could recoup next year their forced contribution to SEIU's "Political Fight-Back Fund," well after the elections influenced by the Fund were decided.

Nor can a special political assessment be analogized to normal fluctuations in general union expenses. As to general operating expenses funded by regular dues and fees, it may be reasonable to permit a union to "calculat[e] its fee on the basis of its expenses during the preceding year," because those expenses are likely to remain relatively constant. *Hudson*, 475 U.S. at 307 n.18. But SEIU did not impose a permanent, across-the-board increase in dues and fees for general purposes. Instead, it imposed a special assessment for specific purposes, for a limited time, and not for general union functions. R. 65 at 5, ¶ 20.[7]

Here, the special assessment was specifically designated as a "Political Fight-Back Fund," which the union asserted "will not be used for regular costs of the union — such as office rent, staff salaries or routine equipment replacement, etc." JA 26; *see also* JA 28; *see also* Pet. App. A at 42a, 628 F.3d at 1135 ("The temporary assessment was contemplated as a political fundraising vehicle...."). [8] The procedure *Hudson* approved for regular dues and fees simply

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[7] "Assessments" are, by definition, distinguishable from union dues. *See NLRB v. Food Fair Stores, Inc.*, 307 F.2d 3, 14-16 (3d Cir. 1962).

[8] Notwithstanding SEIU's clear and unambiguous statements describing the political purposes of the temporary special assessment when it was adopted and collected, the Ninth Circuit opined that "the Union had *already* reduced the fee for objecting nonmembers, and has demonstrated that the assessment was not purely non-chargeable, *nor intended to be so*." Pet. App. A at 12a, 628 F.3d at 1122 (second emphasis added). Although *Hudson* recognizes that "there are practical reasons why '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required,'" 475 U.S. at 307 n.18, quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), it did not endorse considered imprecision. The best response to this type of "veil of ignorance" situation, J. Rawls, *A Theory of Justice* § 24 (Belknap 1971), is to take the union at its word as to the purpose for which the assessment was to be used, and require notice and opportunity to opt out of paying it, as Judge Wallace recognized. *See* Pet. App. A at 43a-44a, 628 F.3d at 1135-36, quoting Pet. App. B at 65a-66a.

"does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose," 475 U.S. at 305, when the union levies a special assessment to fund a particular political campaign.[9]

Therefore, when a union imposes a special assessment—especially one created to support nonchargeable political and ideological activities—the "least restrictive means" of protecting nonmembers' rights mandates that the union: (1) cannot collect that assessment from those who already have objected; and (2) must not collect the special assessment from other nonmembers until it has ascertained their wishes by providing them with a new notice and an opportunity to opt out.

The Ninth Circuit's contrary result is unacceptable. It permits unions to exact from those who might object involuntary loans, by simply timing political assessments to occur after the issuance of their regular *Hudson* notices. For example, SEIU could levy a massive assessment on the Nonmembers in August 2012 to influence the upcoming presidential election, thereby forcing those Nonmembers who had not previously objected to support financially that presidential campaign, whether they liked it or not, without giving them an opportunity to object until the following year, long after the election had been decided.

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[9] The Ninth Circuit majority claimed that it would have been "impossible" for the union to create a financial disclosure for the special assessment before the expenditures were incurred. Pet. App. A at 10a-11a, 628 F.3d at 1121. That is incorrect. SEIU knew before it collected a dime for its "Political Fight-Back Fund" that the Fund would be used for electoral politics that are obviously nonchargeable to Nonmembers. It did not need to conduct an after-the-fact accounting to determine its own, publicly-stated intentions.

Nonmembers enjoy a constitutional right to refrain from subsidizing a union's political campaigns for or against public ballot initiatives. SEIU clearly violated that right by failing to provide the Nonmembers with notice and opportunity to object to paying a special political assessment *before* the assessment was collected and used to influence an election. The Ninth Circuit and its "balancing" test should be reversed on the first Question Presented.

III. Employees Cannot Constitutionally Be Compelled to Support Union Political Expenditures.

The Ninth Circuit panel majority applied a "germane to collective bargaining" test to SEIU's expenditures opposing Proposition 76. It deemed them chargeable because the proposition's passage "would have effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances." Pet. App. A at 6a-7a n.2, 628 F.3d at 1119 n.2. Both this conclusion and its premise are erroneous.

Foremost, union expenses are not chargeable to nonunion employees if merely "germane to collective bargaining"—they must also be justified by a vital government interest and not additionally burden free speech. *See* § III(A), *infra*. Moreover, except for the very narrow context of "contract ratification or implementation," union political expenses are presumptively nonchargeable. *See* § III(B), *infra*. Therefore, the Nonmembers' constitutional rights were violated by compelling them to support SEIU's opposition to Proposition 76. *See* § III(C), *infra*.

A. Chargeable Union Expenditures Must Satisfy Strict Scrutiny, Even If They Are Germane to Collective Bargaining.

As demonstrated in § I, *supra*, government may constitutionally compel association with expressive organizations only if the compulsion is justified by a compelling state interest and the compulsion does not burden speech beyond that necessary to achieve that interest (*i.e.*, be a "least restrictive means"). *Dale*, 530 U.S. at 648; *Rutan*, 497 U.S. at 72; *Roberts*, 468 U.S. at 623; *Elrod*, 427 U.S. at 362-63. This test must likewise be satisfied when the government compels association with a labor union. *See Hudson*, 475 U.S. at 303 & n.11; *Lehnert*, 500 U.S. at 519; *Ellis*, 466 U.S. at 455-56.

Lehnert is the Court's most recent decision to consider the chargeability to nonmembers of specific types of union activities. It is particularly relevant here because it considered the chargeability of "lobbying and electoral politics." 500 U.S. at 514.[10] Two different tests were applied in *Lehnert* to reach the same conclusion: forced support of political expenditures like those in this case is constitutionally impermissible.

Justice Blackmun, writing for the majority, held that "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; *and* (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." 500 U.S. at 519 (emphasis added). As shown *supra* pp. 13-14, this test is a specific application of traditional First Amendment strict scrutiny.

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[10] The more recent decision in *Locke* is not on point on this issue, because the only issue there was the chargeability of "national litigation activity for which [a] local charges nonmembers [that] concerns only those aspects of collective bargaining, contract administration, or other matters that the courts have held chargeable." 555 U.S. at 220. *Locke* did, however, acknowledge that "nonchargeable union activities [include] political, public relations, or lobbying activities." *Id.* at 211.

Justice Scalia, writing for himself and Justices O'Connor, Kennedy, and Souter, applied an alternative "statutory duties" test in which a union expenditure is chargeable only if "incurred for the conduct of activities in which the union owes a duty of fair representation to the nonmembers being charged." 500 U.S. at 558 (Scalia, J., concurring in part, dissenting in part).

Under either of these tests, the Ninth Circuit panel majority erred in holding that a union expenditure is chargeable if merely "germane to collective bargaining." Pet. App. A at 6a-7a n.2; 628 F.3d at 119 n.2. This singular test ignores the fact that the *Lehnert* majority's three-prong test used the conjunctive "and," not the disjunctive "or." Therefore,

> "germaneness" is not the be-all/end-all question in the constitutional analysis, but rather is only the first prong: Under *Lehnert*, not only must the mandatory fee be germane to some otherwise legitimate economic or regulatory scheme, the compelled funding must also be justified by vital interests of the government, and not add significantly to the burdening of free speech inherent in achieving those interests.... [I]n a case such as this involving the forced funding of political and ideological speech, those factors obtain the utmost significance.

Southworth v. Grebe, 151 F.3d 717, 727 (7th Cir. 1998), *rev'd on other grounds*, 529 U.S. 217 (1999).

In short, the majority below ignored the two more important tests uniformly required to compel association, *i.e.*, the compelling governmental interest and the least restrictive means. It is only because of government's interest in maintaining "labor peace" within its workplaces that employees can be compelled to associate with a union in any respect. *Abood*, 431 U.S. at 220-21.[11] If compelled support for a union activity is not necessary to achieve this state interest, or it adds significantly to the burden on nonmembers' free speech, then the state cannot override employees' First Amendment right to withhold their support, irrespective of the activity's "germaneness" to collective bargaining.

The "germaneness" and "statutory duties" tests merely serve a gatekeeper function: if a union expenditure fails to meet this minimal requirement of being directly related to the statutory scheme causing the compelled association, there is no need to proceed to the second and third elements of the *Lehnert* three-part test. "Germaneness" is the first issue to be considered under the majority test in *Lehnert*; likewise, "a charge must *at least* be incurred in performance of the union's statutory duties" under

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[11] The "free rider" interest is derivative of the "labor peace" interest. According to this Court, government's interest in ensuring "labor peace" within a workforce justifies the imposition of exclusive representation on employees. That, in turn, spawns a so-called "free rider" interest in requiring employees to pay for this monopoly representation. *See Abood*, 431 U.S. at 221-22. Absent a "labor peace" interest that justifies forced association with a union, there is no derivative interest in avoiding "free riding" on that representation.

Justice Scalia's test. 500 U.S. at 558 (opinion of Scalia, J.) (original emphasis).

The order of *Ellis*' analysis is instructive. There, this Court first evaluated whether union expenses fell within the union's statutory duties as an exclusive representative. 466 U.S. at 448-55. Only those union expenses that passed this screening test were evaluated to determine if they were "supported by a governmental interest" and did not "involve additional interference with the First Amendment interests." *Id.* at 455-57. A union activity being "germane" to collective bargaining is only the beginning of the constitutional analysis, not its end, as the Ninth Circuit believed.

For this reason, the Ninth Circuit's singular "germaneness" standard should be rejected. Moreover, the "statutory duties" test should be adopted for performance of this initial screening function in lieu of the "germaneness" test. The "statutory duties" test is more directly rooted in the state action causing the compelled association, more consistent with *Ellis*, and more clearly defined and thus easier to administer. *See Lehnert*, 500 U.S. at 552-58 (opinion of Scalia, J.). In contrast, as Justice Scalia predicted in *Lehnert, id.* at 551, the amorphous nature of the "germaneness" standard has led to uncertainty and burdensome litigation, as unions repeatedly contend that virtually all of their activities are somehow "germane" to collective bargaining and thus chargeable.[12]

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[12] Not only have unions argued, as here, that public political campaigns concerning ballot initiatives are chargeable, they also have argued that: organizing is chargeable, *Scheffer v. Civil Service Employees Ass'n, Local 828*, 610 F.3d 782, 787-91 (2d Cir. 2010), despite *Ellis*' holding to the contrary, 466 U.S. at

This Court should resolve the issue which so divided the Court in *Lehnert*, and expressly clarify that nonmembers can only be constitutionally compelled to pay for union activities that: (1) are incurred in performance of the union's statutory duties for which the union owes a duty of fair representation to the employees; (2) are necessary to satisfy the government's interests in maintaining labor peace in the workplace and avoiding free riders; and (3) do not burden speech or association beyond that necessary to achieve those interests.[13]

451-53; and that lobbying the federal government is chargeable, *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1422-23 (D.C. Cir. 1997), *aff'd on other grounds*, 523 U.S. 866 (1998), *Lehnert* notwithstanding. 500 U.S. at 520. These arguments, of course, expand the term "germane" beyond its normal definitions of "closely related" and "closely connected," *Webster's New Universal Unabridged Dictionary* 767 (Deluxe 2d ed. 1979).

[13] The Court should not eliminate the requirements of a vital state interest and narrow tailoring. That would be inconsistent with this Court's compelled expressive association jurisprudence, and could result in a standard that could easily be manipulated by governments granting unions and other groups the statutory duty to engage in: (1) conduct not necessary to achieve a vital state interest; or (2) core expressive activities such as politics. For example, if the test were solely statutory duties, California could try to compel employees to pay for SEIU political expenses by simply giving the union the statutory power to act as their political representative. The government's mere designation of a representative for individuals cannot itself justify compelling support for that entity. An underlying vital state interest for the compulsion is necessary to justify the infringement on individuals' First Amendment rights.

B. Chargeable Union Political Expenses Are Limited to Contract Ratification or Implementation.

Whether or not the Court clarifies the *Lehnert* test, the Ninth Circuit majority's conclusion that nonmembers may constitutionally be compelled to subsidize union political expenses defies the judgment of eight Justices in *Lehnert*. With only a very narrow exception in the public sector, political and lobbying expenditures fail all of the tests that must be met to justify compelling expressive association.

First, unions do not have a general statutory duty to engage in political and lobbying activities for exclusively represented employees. SEIU has no such duty here.[14] Justice Blackmun's plurality explicitly recognized that political and lobbying activities other than for contract ratification and implementation are not germane to collective bargaining:

> Where ... the challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective-bargaining agreement, but to financial support of the employee's profession or of public employees generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees.

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[14] The governing statute defines the authority of an exclusive bargaining representative as "the right to represent [an appropriate] unit in employment relations with the state." Cal. Gov't Code § 3515.5.

500 U.S. at 520.[15] Justice Scalia agreed, finding that "the challenged lobbying expenses are nonchargeable" because, like public relations activities, "though they may certainly affect the outcome of negotiations, [they] are no part of th[e] collective-bargaining process." *Id.* at 559 (Scalia, J., concurring).

Second, as the plurality opinion in *Lehnert* also recognized, compelling support for political or lobbying activities is not "justified by the government's vital policy interest in labor peace and avoiding 'free riders,'" *id.* at 519 (opinion of Blackmun, J.):

> Labor peace is not especially served by allowing such charges because, unlike collective-bargaining negotiations between union and management, our national and state legislatures, the media, and the platform of public discourse are public fora open to all. Individual employees are free to petition their neighbors and government in opposition to the union which represents them in the workplace. Because worker and union cannot be said to speak with one voice, it would not further the cause of harmonious industrial relations to compel objecting employees to finance union political activities as well as their own.

Id. at 521 (opinion of Blackmun, J.).

This conclusion is certainly correct, as government's concern for "labor peace" has no application in

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[15] Although Justice Marshall concurred as to Justice Blackmun's three-part test, making it the majority test, he dissented from Justice Blackmun's application of it to lobbying and politics. *Lehnert*, 500 U.S. at 533-34 (Marshall, J., concurring in part, dissenting in part).

"public fora" outside of the workplace. *Id.* "Labor peace" is an interest in avoiding workplace disruptions that might be caused by employees making "conflicting demands" on their employer through multiple unions. ***Abood***, 431 U.S. at 220-21; *see id.* at 224. The Court saw designation of a single, exclusive representative to speak for all employees *vis-a-vis* their public employer as a permissible solution to the perceived problem of diverse expressive association *within* the workplace. *Id.* at 220-21; *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 52 (1983).

Whatever its merits within the workplace, the "labor peace" rationale has no application to the "public fora" where political and lobbying activities occur. *Lehnert*, 500 U.S. at 519-22 (opinion of Blackmun, J.). Government has no legitimate interest in suppressing "conflicting demands" from multiple individuals or associations regarding political or public affairs by requiring that they speak through a government-designated representative. *See Abood*, 431 U.S. at 230 (discussing *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n*, 429 U.S. 167 (1976)).

Indeed, the First Amendment favors such diversity of expressive association, because "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968); *see also City of Berkeley*, 454 U.S. at 295 ("The Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas. That concept has been stated and restated almost since the Constitution was drafted."). Indeed, this constitutional principle predates the First Amendment. *Cf.* James Madison, *The Federalist* No. 51 at 281 (Global Affairs Publ'g Co. 1987) ("Ambition must be made to counteract ambition" to preserve liberty).

For example, if State employees supported multiple organizations, some on opposite sides of the battle over Proposition 76, this is not a "problem" that California may solve by compelling all State employees to support the position of one organization, such as SEIU. It is not a problem at all. Rather, it reflects the diversity of expressive association and viewpoints the First Amendment fully protects. Although government may have an interest in compelling association to ensure workplace "labor peace," it has no legitimate, let alone compelling, interest in forced association on one side or the other of any political controversy.

Third, the *Lehnert* plurality recognized that "[w]here the subject of compelled speech is the discussion of governmental affairs, which is at the core of our First Amendment freedoms, ... the burden upon dissenters' rights extends far beyond the acceptance of the agency shop and is constitutionally impermissible." 500 U.S. at 522 (opinion of Blackmun, J.) (citations omitted). That the "burden upon freedom of expression is particularly great where ... the compelled speech is in a public context," *id.*, is so manifestly correct as to require no further discussion. This Court has never "upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." *United Foods*, 533 U.S. at 415.

The *Lehnert* plurality opinion recognized a narrow exception to the rule barring compulsory support for union lobbying in the "limited context of contract ratification or implementation." 500 U.S. at 522 (opinion of Blackmun, J.). The four-Justice concurrence did not expressly adopt this ratification exception, stating only that "the challenged lobbying expenses are nonchargeable." *Id.* at 559 (Scalia, J., concurring in part). Logically, this exception can only pass the statutory duties test to the extent that a union has a legal duty to "secur[e] ratification of negotiated agreements by the proper state or local legislative body" or "to acquire appropriations for approved collective-bargaining agreements." *Id.* at 520 (opinion of Blackmun, J.). If such a duty exists here at all, it does not extend to lobbying and political campaigns concerning legislation or ballot propositions of general application that merely *might* affect bargaining or contract implementation. *See id.* at 559 (Scalia, J., concurring in part).[16]

Moreover, the vital governmental interest and narrow-tailoring tests do not permit extension of the exception to require forced subsidization of any lobbying or political activity somehow related to a contract's terms or the economic solvency of the government. *See id.* at 520-22 (opinion of Blackmun, J.). Only contract ratification and implementation bear any relation to government's interest in ensuring "labor peace" within its workplaces, as it puts into place and implements "agreements and settlements that are not subject to attack from rival labor organizations." *Abood*, 431 U.S. at 221. In contrast, union lobbying for any other purpose does nothing to quell "conflicting demands" by multiple unions within the workplace, *id.*, and is indistinguishable from the lobbying and politics that other advocacy groups engage in for their constituents.

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[16] The political activities here are "germane to collective bargaining" in the same way as the airline union's "contacts with government agencies and Congress concerning the union's views as to appropriate federal regulation of airline safety" are in *Miller*. The D.C. Circuit rejected the argument that such expenditures were properly chargeable, recognizing that a contrary conclusion would lead to the exception swallowing the rule, for if merely taking a subject up in collective bargaining is sufficient to render a union's government-relations expenditures on that subject chargeable, then "virtually all of [the union's] political activities could be connected to collective bargaining." *Miller*, 108 F.3d at 1422. For example, "[u]nder that reasoning, union lobbying for increased minimum wage laws or heightened government regulation of pensions would also be germane." *Id.*

C. It Is Unconstitutional to Compel Nonmembers to Support SEIU's Political Activities in Opposition to a Ballot Initiative.

The Ninth Circuit panel erred in declaring that the Nonmembers could constitutionally be compelled to subsidize SEIU's opposition to ballot Proposition 76. This political expenditure cannot survive any of the tests for chargeability. Like other political expenditures, it: (1) is neither incurred pursuant to the union's statutory duties nor germane to collective bargaining; (2) is not necessary to achieve the state's interest in maintaining "labor peace" and "avoiding free riders" within its workplaces; and (3) significantly burdens the Nonmembers' freedom of expression.

The panel majority determined that union expenditures to defeat Proposition 76 were "germane to collective bargaining" because the proposition "would have effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances." Pet. App. A at 6a-7a n.2, 628 F.3d at 1119 n.2. Primarily, this is incorrect because the panel majority relied upon SEIU's hyperbolic representations about the proposal, rather than the text of the proposal itself.[17]

The California Secretary of State's official ballot measure summary made clear that Proposition 76's purpose was primarily, if not exclusively, *fiscal* in nature.[18] The more detailed official title and summary prepared by California's Attorney General likewise made only a generalized mention of the proposal's effect to allow the "Governor, under specified circumstances, to reduce appropriations of the Governor's choosing, including employee compensation/state contracts."[19] The measure made no mention of SEIU, or its collective bargaining agreements.

The only reference to collective bargaining in the official documents is general, appearing in an Analysis by the Legislative Analyst, and relates to state funding.

> The reductions may apply to *all* General Fund spending except for (1) expenditures necessary to comply with federal laws and

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[17] The text of the initiative appears at http://ag.ca.gov/initiatives/pdf/sa2005rf0067_amdt_1_ns.pdf (last visited Aug. 30, 2011).

[18] *See* Official Voter Information Guide, http://vote2005.sos.ca.gov/voterguide/ballot_measure_summary.shtml#Prop76 (last visited Aug. 30, 2011); *see also* Pet. App. A at 43a n.4, 628 F.3d at 1135 n.4 (Wallace, J., dissenting) ("properly understood Proposition 76 was a ballot measure related to the allocation of tax revenue for funding government activities, which included the amount of financial support available to fund public employment").

[19] Official Title & Summary Prepared by the Attorney General, http://vote2005.sos.ca.gov/voterguide/prop76/title_summary.shtml (last visited Aug. 30, 2011).

> regulations, (2) appropriations where the reduction would violate contracts to which the state is already a party, and (3) payment of principal and interest that is due on outstanding debt. Any General Fund spending related to contracts, collective bargaining agreements, or entitlements for which payment obligations arise after the effective date of this measure would be subject to these reductions.[20]

Proposition 76 placed no particular collective bargaining agreement—let alone the SEIU's collective bargaining agreements—in specific jeopardy of abrogation. This initiative merely addressed the way that the general revenue stream for the entire State government might be altered.

Thus, SEIU's political expenditures against Proposition 76 are directly analogous to the expenditures for millage elections held nonchargeable in *Lehnert*. 500 U.S. at 527. The union in *Lehnert* coerced funding for ballot issues on local taxes for the support of public schools in Michigan, called "millage" elections. The lower court in *Lehnert* held that expenditures for "millage and ballot campaigns" necessary to fund public education were chargeable because "such activities are directly related to collective bargaining." *Lehnert v. Ferris Faculty Ass'n*, 881 F.2d 1388, 1392 (6th Cir. 1989), *rev'd in pertinent part*, 500 U.S. 507 (1991). Eight members of this Court rejected the chargeability of these expenses, with the plurality finding it to be "of little consequence" that the millage taxes supported public schools. 500 U.S. at 527 (opinion of Blackmun, J.); *accord id.* at 559 (Scalia, J., concurring). Because the activity was not for the "ratification or implementation of [the objector's] collective-bargaining agreement," it was not chargeable. *Id.* at 527 (opinion of Blackmun, J.)

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[20] Proposition 76: School Funding; State Spending; Initiative Constitutional Amendment (Legislative Analyst's Office, July 2005), http://vote2005.sos.ca.gov/voterguide/prop76/analysis.shtml (last visited Aug. 30, 2011).

Even if Proposition 76 had some tangential relationship to collective bargaining, the egregious constitutional infringement caused by compelling the Nonmembers to subsidize SEIU's opposition to it requires that these expenses be held nonchargeable. Speech regarding public ballot initiatives is inherently "at the heart of the First Amendment's protection" because it concerns informing and persuading the public with respect to a matter of public affairs. *Bellotti*, 435 U.S. at 776 (finding it unconstitutional to restrict corporate expenditures in opposition to ballot initiatives).

SEIU used the special assessment to generate speech to influence *the public* with respect to how they should vote on Proposition 76. *Lehnert* recognizes that it is impermissible to allow a "union ... [to] use each dissenter as 'an instrument for fostering public adherence to an ideological point of view he finds unacceptable.'" 500 U.S. at 522 (opinion of Blackmun, J.), quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).[21] Thus, SEIU's expenditures on

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[21] This Court also has rejected union attempts to compel employees to subsidize union speech intended to convince others to support the union or its agenda outside of politics. *Ellis* held that union expenses to increase union membership are nonchargeable because, among other things, the "money is spent on people who are not union members, and only in the most distant way works to the benefit of those already paying dues." This is "a far cry from the free-rider problem with which Congress was concerned." 466 U.S. at 452-53.

Proposition 76 should be held nonchargeable to the Nonmembers, and the Ninth Circuit must be reversed on the second Question Presented, as well as the first.

CONCLUSION

This Court should reverse the judgment below on both Questions Presented. On the first, the Ninth Circuit's ruling is contrary to strict scrutiny and *Hudson*'s holding that a union must provide adequate notice and the opportunity to opt out before extracting forced fees from nonmembers. The Court should hold that, in addition to annual *Hudson* notices, when a union imposes a forced-fee increase primarily or solely for political purposes between notices, it may not collect the increase from nonmembers who have already objected, and it must not collect the increase from other nonmembers until it has ascertained their wishes by providing them with a new notice about the increase's purpose and an opportunity to opt out.

On the second Question Presented, the Ninth Circuit's ruling is contrary to *Lehnert*'s holding that nonmembers may not constitutionally be compelled to subsidize a union's political and lobbying expenditures outside the narrow context of contract ratification or implementation. The Court should reverse the Ninth Circuit's ruling and hold that, consistent with strict scrutiny, nonmembers may only be compelled to subsidize union activities that: (1) are incurred in performance of the union's statutory duties for which the union owes a duty of fair representation to the employees; (2) are necessary to satisfy the government's interests in maintaining labor peace in the workplace and avoiding free riders;

and (3) do not burden speech or association beyond that necessary to achieve those interests.

The Court should then remand the case for further proceedings consistent with its decision.

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RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U
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No. 10-1121

IN THE

Supreme Court of the United States

DIANNE KNOX, *et al.*
Petitioners,
v.
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986), recognizes that all workers represented by a public employee union may be required to pay their fair share of union expenditures germane to collective bargaining representation, but requires that the union provide nonmembers with an opportunity to object to paying for the union's nongermane political and ideological expenditures. Under *Hudson*, nonmembers are entitled to "an adequate explanation" of how the union calculated the percentage of membership dues that will be charged to objectors and "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker . . . ." *Id.* at 310. *Hudson* provides that the percentage of membership dues that are chargeable to objectors each year may be calculated on the basis of the union's total chargeable and nonchargeable "expenses during the preceding year." *Id.* at 307 n.18.

1. If a public employee union has already issued an annual *Hudson* notice establishing an objector fee based upon its auditor-verified expenditures in the preceding year, must the union, when instituting a temporary increase in membership dues that will not change the objector fee rate, issue a supplemental notice that predicts how the funds generated by the increase will be used, establishes a new objector fee rate solely for the increase based upon those predictions, and provides nonmembers with a separate opportunity to object to paying the predicted nonchargeable portion of the increase?

2. (a) Can nonmembers of a public employee union pursue in this Court a chargeability challenge to the union's spending to oppose a ballot initiative, where they disavowed and never litigated such a claim below, where the decision below did not decide such a claim, and

where there is no evidence that objectors' fees were spent to support the union's opposition to the initiative?

(b) If so, is a public employee union's opposition to a ballot initiative that would give a state's governor the power to abrogate the union's collective bargaining agreements sufficiently related to "contract . . . implementation," *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991), and consistent with the other elements of the *Lehnert* standard, *see id.* at 519, that the costs of that opposition are chargeable to all nonmembers?

CORPORATE DISCLOSURE STATEMENT

Respondent Service Employees International Union, Local 1000 is organized as a California nonprofit mutual benefit corporation. It has no parent corporations in the sense of ownership, although it is affiliated with the California State Employees Association, which is also organized as a California nonprofit mutual benefit corporation, and with the Service Employees International Union, which is organized as an unincorporated association. There is no publicly held company that owns 10% or more of Respondent's stock.

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IN THE

Supreme Court of the United States

No. 10-1121

DIANNE KNOX, *et al.*
Petitioners,
v.
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000,
Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

I. Facts

June 2005* Hudson *Notice: In June 2005, Respondent Service Employees International Union, Local 1000 ("Respondent") issued its annual fair share fee or "*Hudson*" notice to the state employees whom it represents in collective bargaining, but who choose not to become dues-paying members ("nonmembers").[1] Joint Appendix ("JA") 94, 96-151. That notice reported that Respondent's actual spending in the most-recently audited prior year, calendar year 2004, was 56.35% chargeable to fee objectors – i.e., incurred for activities that nonmembers can constitutionally be compelled to support – and 43.65% nonchargeable. Based on that figure, the notice informed nonmembers that during the coming fee year (July 2005 through June 2006) they would be charged fair share fees at a rate no greater than 56.35% of membership dues if they submitted a timely objection to paying for nonchargeable expenditures (hereinafter "objectors"), and 99.1% of dues if they chose not to do so (hereinafter "nonobjectors"). JA 98-111.[2] The notice disclosed the types of nonchargeable activities (including nonchargeable political activities) that Respondent had undertaken previously and that could be financed with nonobjectors' fees absent objection. *Id.*

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[1] The term "*Hudson* notice" refers to the fee notice required by this Court in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986).

The notice informed nonmembers that their fees were a percentage of membership dues – at that time, 1.0% of gross wages – and that dues (and hence fair share fees) were subject to increase during the fee year without further notice. JA 98; Petition Appendix ("Pet. App.") 5a.[3]

Petitioners Dianne Knox, *et al.* ("Petitioners") concede the constitutional adequacy of the June 2005 *Hudson* notice as of its issuance. Ninth Circuit Opposition Br. at 39 n.23. 3,351 nonmembers, constituting 11.83% of all nonmembers, submitted objections after receiving that notice. JA 314, 319.

September 2005 Dues Increase: At the end of July 2005, Respondent's Budget Committee proposed an emergency temporary dues increase (the "increase"), which was approved by Respondent's democratically-elected Council in late August 2005 and implemented in September 2005. Pet. App. 5a-6a; JA 25-28, 31-32, 68. There is no evidence that the increase was under consideration when the June 2005 *Hudson* notice was issued, or that the increase was timed to avoid disclosure in that notice. The increase expired by its terms at the end of December 2006. Pet. App. 5a; JA 31, 314, 319.

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[2] The nonobjector fee is less than 100% because nonmembers are not charged for certain member-only benefits. JA 98.

[3] Nonmembers who do not wish to contribute to Respondent's Political Action Fund may request a corresponding reduction in their fees even if they choose to pay the nonobjector fee rate. *See, e.g.*, JA 104-05. They can request that reduction at any time during the fee year.

The increase raised membership dues by one-quarter of one percent (0.25%) of gross wages, from 1.0% to 1.25% of gross wages, and thereby raised the dollar amount of nonmembers' fair share fees, which are based on dues. JA 31, 68, 314, 318. The increase, however, did not change the percentage of membership dues nonmembers paid. Instead, the increase collected from nonmembers reflected the percentages set forth in the June 2005 *Hudson* notice: Objectors paid 56.35% of the increase to dues, and nonobjectors paid 99.1%. Petitioners' Brief ("Pet. Br.") at 5; *see also* JA 309-10.

Petitioners recount statements by Respondent suggesting that funds raised by the increase were intended for "political" activities. *See* Pet. Br. at 4-5, 9, 22 & n.8, 23 n.9. However, Respondent never stated that those funds would be devoted *exclusively* to "political" or nonchargeable activities. Instead, "in response to inquiries, [Respondent] specifically stated it intended to split the increase 'between political actions and collective bargaining actions.'" Pet. App. 6a; *see also* Record 6 (Declaration of Petitioners' Counsel) at Exh. A.[4]

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[4] Petitioners emphasize Respondent's statement that the increase "'w[ould] not be used for regular costs of the union – such as office rent, staff salaries or routine equipment replacement.'" Pet. Br. at 4, 9, 22. Funds generated by the increase, however, could be and were used for chargeable activities that do not constitute such "overhead" costs. For example, they financed union meetings and a membership

The funds generated by the increase were not placed in a separate bank account or otherwise segregated from other funds. JA 303. There is no evidence that the deduction for the increase was reflected on employee paychecks separately from other dues and fee deductions.

When Respondent's independent auditors subsequently traced the expenditures from the increase, they determined that 27.35% of Respondent's 2005 spending from the increase and 18.77% of its 2006 spending from the increase were attributable to chargeable activities. JA 190, 259.

June 2006* Hudson *Notice: In June 2006, Respondent issued its next annual *Hudson* notice. JA 94, 152-215. That notice reported that Respondent's actual spending – including its spending from the increase – in the most-recently audited year, calendar year 2005, was 68.80% chargeable and 31.20% nonchargeable, and informed nonmembers that during the coming fee year (July 2006 through June 2007) they would be charged fees at a rate no greater than 68.80% of dues if they submitted a timely objection, and 99.1% of dues if they chose not to do so. JA 154-66.[6] The notice included an audited financial report regarding the spending from the increase, which was also included in its statement of total, chargeable, and nonchargeable expenses, showing that the

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survey, the chargeability of which (in whole or in part) cannot reasonably be disputed. JA 188-97. Further, although Petitioners equate "political" activities with "nonchargeable" activities, "not all of the political activities [funded by the increase] fell into the 'non-chargeable' category. The [increase] itself included no spending limitations, and the money was actually used for a range of activities, both political and not, and both chargeable and not." Pet. App. 6a.

[6] Respondent subsequently exercised its discretion to charge objectors a lesser rate of only 66.30% of membership dues during that fee year. JA 305.

increase was spent on both chargeable and nonchargeable activities. JA 166, 188-97.

The financial report reveals that, even if Respondent's 2005 spending from the increase were deemed 100% nonchargeable, the chargeable percentage of Respondent's actual annual expenditures would still have been higher in 2005 than in 2004: 66.26% chargeable in 2005 vs. 56.35% in 2004.[6]

In response to the June 2006 *Hudson* notice, 3,094 nonmembers, constituting 10.50% of all nonmembers, submitted objections, fewer in both absolute and percentage terms than submitted objections following the June 2005 *Hudson* notice. JA 314, 319.

June 2007* Hudson *Notice: In June 2007, Respondent issued its next annual *Hudson* notice. JA 94, 216-91. That notice disclosed that actual spending – including spending from the increase – in the most-recently audited year, calendar year 2006, was 60.36% chargeable and 39.64% nonchargeable, and informed nonmembers that during the coming fee year (July 2007 through June 2008) they would be charged fair share fees at a rate no greater than 60.30% of dues if they submitted a timely objection, and 99.3% of dues if they chose not to do so. JA 219-32. At the time of the notice, dues had permanently increased to 1.5% of gross wages. JA 219.

The June 2007 *Hudson* notice included an audited financial report regarding spending from the increase, which was also included in the statement of total, chargeable, and nonchargeable expenses, showing that the increase was spent on both chargeable and nonchargeable activities. JA 232, 256-72.

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[6] Respondent's total 2005 expenditures were $40,045,409. JA 166. Its total chargeable expenditures were $27,552,746. *Id.* If the 2005 expenditures from the increase were deemed *entirely* nonchargeable, the total chargeable expenditures would instead be $26,533,740, yielding an overall chargeable percentage of 66.26. *Id.*

The financial report discloses that, even if Respondent's 2006 spending from the increase were deemed 100% nonchargeable, its actual expenditures during 2006 would still have been 57.38% chargeable – higher than the 2004 percentage (56.35%).[7]

II. Proceedings

Petitioners filed suit on November 1, 2005, asserting that the increase was entirely nonchargeable to objectors and that Respondent was constitutionally required, before collecting the increase, to issue a supplemental notice providing nonmembers with a new opportunity to object to paying the increase. Pet. Br. at 5-6. The District Court agreed that Respondent was required to provide a supplemental notice, and entered summary judgment for Petitioners. *Id.* at 6. The court determined, however, that Respondent's disclosure of the increase in its June 2006 *Hudson* notice was constitutionally adequate, and therefore limited the remedial period to September 2005 through June 2006, when the 2005-2006 fee year ended. Pet. App. 73a.

On appeal, the Ninth Circuit reversed the District Court's grant of summary judgment to Petitioners, holding that Respondent's June 2005 *Hudson* notice was adequate to protect nonmembers' First Amendment rights. Pet. App. 10a-16a.

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[7] Total 2006 expenditures were $42,204,170. JA 232. Total 2006 chargeable expenditures were $25,475,361. *Id.* If the 2006 expenditures from the increase were deemed *entirely* nonchargeable, Respondent's total chargeable expenditures in 2006 would have been $24,215,042, yielding an overall chargeable percentage of 57.38. JA 232, 258-59.

This Court granted *certiorari* on June 27, 2011. On October 3, 2011, Respondent moved to dismiss this case as moot, after providing the class members with all of the relief ordered by the District Court and that would be available to them following any favorable decision by this Court. On November 7, 2011, this Court deferred its consideration of Respondent's motion to the hearing of the case on the merits.

SUMMARY OF ARGUMENT

1. To protect nonmembers' First Amendment rights, *Hudson* establishes certain procedures that a public employee union must implement in collecting fair share fees. Respondent here issued a June 2005 *Hudson* notice that Petitioners concede was constitutionally sufficient at the time it was issued, and observed all of *Hudson*'s procedural requirements in collecting fair share fees during the 2005-2006 fee year.

The specific procedural requirements established in *Hudson* fully protected the rights of Respondent's fee payers. Respondent's June 2005 *Hudson* notice provided nonmembers with a description of the types of nonchargeable political and ideological activities engaged in by Respondent, an audited report of the monetary amounts Respondent devoted to those activities in the prior calendar year, and notice of their right to object to the use of their fees for such purposes in the coming fee year. The notice thus provided nonmembers with all of the information necessary to exercise their First Amendment right not to support Respondent's nonchargeable ideological and political activities – including any such activities subsequently funded by the increase. In addition, during the July 2005-June 2006 fee year – both before and after the increase was implemented – objectors actually paid *less* for *chargeable* expenses than Respondent expended on their behalf. Thus, rather than subsidizing Respondent's nonchargeable ideological and political activities, objectors did not even pay their proportionate share of Respondent's chargeable expenses. The facts of this case demonstrate the adequacy of *Hudson*'s "carefully tailored" procedures to protect nonmembers' constitutional rights. 475 U.S. at 303.

Petitioners nonetheless suggest that the First Amendment required Respondent to issue a supplemental notice establishing a new objector fee applicable to the increase based on *subjective* predictions about its future spending. That approach, however, would provide less protection to nonmembers' First Amendment rights than the *Hudson* system, in which objector fees are based upon the union's actual, audited expenses in the prior year. It would also needlessly increase the burden on public employee unions, spur wasteful litigation, and require this Court to abandon a central premise of fair share fee jurisprudence: that money is fungible and thus the amount of the objector fee must be based on the union's *total* annual expenditures.

2. There is likewise no reason for this Court to replace the well-established legal standards governing the substantive and procedural First Amendment rights of fair share fee payers with "strict scrutiny." Doing so would be inconsistent with this Court's prior fair share fee decisions, which have never applied strict scrutiny, *see, e.g., Hudson,* 475 U.S. at 302 (establishing procedures to protect nonmembers' rights "without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities") (citation omitted), and its other decisions involving public employee speech and procedural First Amendment rights, *see, e.g., Waters v. Churchill*, 511 U.S. 661, 671 (1994) (O'Connor, J.) (procedural First Amendment rights measured by considering "the cost of the procedure and the

relative magnitude and constitutional significance of the risks it would decrease and increase"); *Pickering v. Board of Ed.*, 391 U.S. 563, 568 (1968) (in public employee speech cases, courts must balance "the interests of the [employee] . . . in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees").

3. Petitioners' claim that nonmembers were unconstitutionally compelled by the increase to subsidize Respondent's opposition to "Proposition 76" is not properly presented to this Court. Petitioners never litigated, and the Ninth Circuit did not rule upon, such a claim below, and such a challenge cannot be litigated on behalf of a class that includes nonobjectors. In any event, no nonmember was compelled against his or her objection to support Respondent's Proposition 76 expenditures, and those expenditures related directly to contract implementation and were chargeable under the standard established in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991).

ARGUMENT

I. Respondent's *Hudson* Notices Complied with this Court's Decisions and Provided Nonmembers with All Necessary Procedural Protections for their First Amendment Rights

In *Hudson*, this Court established specific procedural requirements for a public employee union's collection of fair share fees. The *Hudson* procedures "'prevent[] compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.'" 475 U.S. at 302. In collecting fair share fees from July 2005 through June 2006, Respondent complied with the specific procedural requirements established by this Court in *Hudson* in all respects. *See, e.g.*, Petitioners' Ninth Circuit Opposition Br. at 39 n.23 (conceding constitutional sufficiency of Respondent's June 2005 *Hudson* notice at the time of its issuance); Record 99 at 14 (acknowledging that Respondent complied with "the usual *Hudson* notice and procedure").

The *Hudson* procedures implemented by Respondent provided constitutionally sufficient protection for nonmembers' First Amendment rights. Respondent's June 2005 *Hudson* notice informed nonmembers of the nature of Respondent's nonchargeable political and ideological activities, provided them with a constitutionally-adequate opportunity to object to supporting those activities, and informed them that their fees could increase without further notice during the fee year. The increase in dues and fees implemented by Respondent in September 2005 did not fund types of nonchargeable activities different from those disclosed in the June 2005 *Hudson* notice, nor did it significantly change the proportion of Respondent's annual spending devoted to nonchargeable activities. Indeed, objectors paid *less* under Respondent's *Hudson* procedures than they would have paid had Respondent charged objectors a fee that accurately reflected the chargeable percentage of its expenditures during the entire 2005-2006 fee year.

Accordingly, the theoretical possibility that a union's strict compliance with *Hudson*'s procedures could nonetheless compel nonmembers to subsidize its political activities through an "involuntary loan" is not presented by the facts of this case. Nonobjectors acquiesced in the use of their fees for nonchargeable political activities during the 2005-2006 fee year. Objectors did not subsidize Respondent's nonchargeable political expenditures, and indeed did not even pay their proportionate share of

Respondent's chargeable expenses. Because nonmembers' substantive rights were not infringed, there is no reason for this Court to revisit *Hudson* in this case.

Were this Court nonetheless to do so, Petitioners' proposed substitute for the *Hudson* procedures should be rejected. That substitute is impractical, provides less protection to nonmembers than the *Hudson* procedures, and is contrary to two basic principles underlying this Court's fair share fee jurisprudence: (1) money is fungible, so a union's total annual expenditures must be evaluated in calculating the objector fee; and (2) objective, independently-verified financial reports disclosing actual expenditures are more reliable than subjective predictions about how funds will be spent.

A. Respondent's Fee Collection Procedures Were Consistent with *Hudson*

The precedents governing a public employee union's constitutional obligations to its nonmembers are well-established. The requirement that employees provide financial support for the union that represents them in collective bargaining – i.e., an agency or fair share fee – "does not violate either the First or the Fifth Amendments." *Railway Employees' Dep't. v. Hanson*, 351 U.S. 225, 238 (1956); *accord Lehnert*, 500 U.S. at 517. Nonetheless, First Amendment concerns are "implicate[d]" when such payments fund "social, political, and ideological viewpoints" that "might bring vigorous disapproval from individual employees." *Lehnert*, 500 U.S. at 516. Thus, "[T]he local union cannot charge the nonmember for certain activities, such as political or ideological activities (with which the nonmembers may disagree). But . . ., the local can charge nonmembers for activities more directly related to collective bargaining." *Locke v. Karass*, 555 U.S. 207, 213 (2009); *see generally Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

Nonmembers, however, have the affirmative duty to object to supporting nonchargeable activities. "[D]issent is not to be presumed – it must affirmatively be made known to the union by the dissenting employee." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961); *accord Hudson*, 475 U.S. at 306 n.16; *see also* Cal. Gov't Code §§3515, 3515.7, 3515.8.

These principles define nonmembers' substantive First Amendment rights. To protect those rights, *Hudson* established prophylactic procedures that public employee unions must implement in collecting fair share fees. Specifically, unions must provide nonmembers with "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310. In explaining the basis for the fee, the union "need not provide nonmembers with an exhaustive and detailed list of all its expenditures," but must simply disclose its "major categories of expenses" as verified "by an independent auditor." *Id.* at 307 n.18.

Because it is impossible to predict future expenses accurately at the beginning of a fee year, "'absolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required.'" *Id.* (quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963)). *Hudson* instead permits objectors' fair share fee to be calculated on the basis of the union's "expenses during the preceding year." *Id.* Unions must base that calculation on the chargeable percentage of their total annual expenditures, *see, e.g.*, *Hudson*, 475 U.S. at 306 (reduction in objector fee must reflect "'the proportion of political to total union expenditures'") (quoting *Abood*, 431 U.S. at 239 n.40), and must treat the funds they collect from members and nonmembers as fungible; they cannot avoid reducing the objector fee simply by ensuring that "the actual dollars collected from dissenting employees" are devoted exclusively "to collective-bargaining purposes," *Abood*, 431 U.S. at 238 n.35.

Hudson's "prior year" system is admittedly imprecise, since a union's breakdown of chargeable and nonchargeable spending is unlikely to be replicated from one year to the next. Yet, as Winston Churchill said of democracy, it is less bad than any of the other methods that might be used.

The necessary effect of *Hudson*'s "prior year" system is to create a lag between the time when a union incurs expenditures and the time when those expenditures are audited, reported to nonmembers, and used to calculate the objector fee. If a union increases its spending on chargeable activities in a given year, it will during that year charge fee payers *less* than is required to recoup the cost of its chargeable activities, and will not recoup those expenses until the *following* year when the objector fee is revised to reflect that spending. Significant fluctuations in the chargeable and nonchargeable proportions of a union's spending are inevitable. A union may, for example, bargain a three-year collective bargaining agreement in year one, the cost of which is fully chargeable; make substantial, nonchargeable partisan political donations in the second, presidential election year; and do neither in the third year. The union's chargeable spending would be relatively high in year one, relatively low in year two, and in between in year three, but the objector fee in each year would be based upon the *prior* year's different spending pattern. Over time, however, the annual adjustment system ensures that objectors are charged only their proportionate share of chargeable expenditures.

Here, Respondent followed the procedures established in *Hudson* to the letter. In June 2005, Respondent sent nonmembers its annual *Hudson* notice. The notice included an audited report of Respondent's chargeable and nonchargeable 2004 expenditures. JA 109-11. The notice informed nonmembers that, if they objected to the use of their fees for nongermane political or ideological purposes, their fees would be no more than 56.35% of dues, reflecting the chargeable percentage of Respondent's 2004 expenditures. JA 98, 102. The notice informed nonmembers of their right to object or to challenge Respondent's chargeability determinations, and that fees could increase without further notice. JA 98-104. Respondent honored all timely objections.

After issuing that notice, Respondent considered and decided to implement the increase at issue in this case. Consistent with its prior *Hudson* notice, objectors paid an increase amounting to 56.35% of the dues increase paid by members. JA 309-10.

In June 2006, Respondent issued another annual *Hudson* notice based on the prior year's audited expenditures (including those from the increase). The notice provided nonmembers with another opportunity to object to paying for nonchargeable activities and to challenge the fee calculation. JA 94, 152-215.

As Petitioners admit, Respondent's procedures complied in all respects with the specific procedural requirements established in *Hudson*. *See* Record 119 at 2 ("the procedures normally followed by [Respondent]" were "endorsed by the Supreme Court in [*Hudson*]"); *see also* Record 99 at 14 (acknowledging that Respondent complied with "the usual *Hudson* notice and procedure").

B. The *Hudson* Procedures Did Not Compel Objectors To Subsidize Respondent's Nonchargeable Activities

Petitioners do not dispute that the *Hudson* procedures are adequate to protect nonmembers' First

Amendment rights in the ordinary case. They contend, however, that Respondent's reliance upon *Hudson's* procedures in this particular case violated the First Amendment because nonmembers were compelled to give Respondent an "involuntary political loan." Pet. Br. at 21. Rather than providing Respondent with such a loan, however, objectors in fact paid *less* than their proportionate share of Respondent's chargeable expenses during the relevant time period.

The objector fee from July 2005 through June 2006 (both before and after the increase) was 56.35% of membership dues, reflecting the chargeable portion of Respondent's actual expenditures in 2004 – a presidential election year in which only 56.35% of Respondent's expenditures were chargeable. As the June 2006 and June 2007 *Hudson* notices reported, however, chargeable expenditures in both 2005 and 2006 *exceeded* 56.35% of Respondent's total expenditures. *See* *discussion*, *supra*, at 4-6. Had Respondent been omniscient and able to charge an objector fee reflecting the actual percentage of its spending during the 2005-2006 fee payer year that was ultimately devoted to chargeable activities, the objector fee would have been *higher* than 56.35%. The *Hudson* procedure thus worked to objectors' advantage during the time period in question; they did not provide Respondent with an "involuntary loan" of any kind.[8]

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[8] This case thus does not involve a temporary "spike" in dues and fees timed to take advantage of a relatively high objector rate in a particular fee year. The objector rate applied to the increase during the 2005-2006 fee year was lower than the objector rate in subsequent fee years, and the increase spanned multiple fee years, so that any increase in nonchargeable spending associated with the increase would have been reflected in a reduced objector rate while the increase remained in effect.

Even if the facts of this case were different and the chargeable portion of Respondent's expenditures during the 2005-2006 fee year had ultimately fallen below the 56.35% objector fee, such a discrepancy between the objector fee and the fee year's actual chargeable spending would not have constituted an "involuntary loan" as discussed in *Hudson*, 475 U.S. at 304-06. *Hudson* disapproved of a "pure rebate" system in which the union collected *full* membership dues from objectors and later issued "a rebate equal to the amount improperly expended" for nonchargeable purposes. 475 U.S. at 305-06; *cf. **Ellis v. Railway Clerks***, 466 U.S. 435, 444 (1984) (union "exact[ed] and us[ed] full dues, then refund[ed] months later the portion that it was not allowed to exact in the first place"). Under that system, objectors always "subsidize[d] the propagation of political or ideological views that they oppose[d]," *id.* at 305, and both the union and the objectors were fully aware of the subsidy.

Hudson contrasted this impermissible "pure rebate"/"involuntary loan" system with the constitutionally permissible "advance reduction" system used by Respondent here, in which the objector fee is reduced *in advance* to an amount reflecting the union's chargeable spending in the most-recently audited year (here, 56.35%). 475 U.S. at 304, 309. As explained above, the advance reduction system ensures that, over time, the fees paid by objectors are roughly equal to their fair share of the union's chargeable expenses. *See* discussion, *supra*, at 12-13. The yearly fluctuations between chargeable expenses and the objector fee even out over time so that objectors never "subsidize" the union's nongermane activities, and neither the objectors nor the union know how the objector fee compares to the union's actual chargeable spending in the course of any particular year.

C. The *Hudson* Procedures Did Not Deny Nonmembers a Fair Opportunity To Object

Petitioners assert that a supplemental notice regarding the increase was "more critical as to the non-objecting employees" than to objectors because the former might have chosen to object "upon learning that SEIU intended to increase their financial burden . . . and use that increase for political purposes . . . ." Pet. Br. at 20-21. Respondent's 2005 *Hudson* notice, however, provided nonmembers with all of the information they needed to decide whether to opt out of paying for Respondent's nongermane political and ideological activities from July 2005 through June 2006.

The 2005 *Hudson* notice informed nonmembers that Respondent intended to use their fees for nongermane political and ideological purposes and, indeed, that more than 43% of 2004 expenditures were for nongermane activities, including nongermane political activities. Nonmembers were thus aware in June 2005 that, unless they objected, Respondent would spend a significant portion of their fees in the upcoming fee year on nongermane political and ideological activities. The notice also informed them of their right to object to supporting such expenditures, and that dues could be raised during the fee payer year without further notice, resulting in a proportionate increase in fees. The notice contained everything nonmembers required to make an informed decision whether to object.

A nonmember's exercise of the right to object cannot depend upon advance notice of the *specific* expenditures a union will make in the upcoming year, which the union cannot predict with any accuracy because spending will depend upon external events. To the contrary, the *Hudson* procedures that Petitioners acknowledge are constitutionally sufficient when applied to "general operating expenses funded by regular dues and fees," Pet. Br. at 21-22, never include such advance notification of specific expenditures. "The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures," but only a report of its "major *categories* of expenses" in "the *preceding* year." *Hudson*, 475 U.S. at 307 n.18 (emphases added); *see also id.* at 306-07 (financial disclosure requirement protects only the right to verify "the proportionate share" objectors can lawfully be compelled to pay). *Abood* emphasized that nonmembers' right to object depends not upon advance notification of a union's specific expenditures but upon their objection to "ideological expenditures of *any* sort," and that nonmembers should not bear "the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative." 431 U.S. at 241 (emphasis added).

A mere increase in the *dollar amount* of dues or fair share fees at some point after the issuance of an annual *Hudson* notice without any change in the fee rate as a percentage of membership dues – which occurs every time a nonmember receives a salary increase – does not deny nonobjectors a fair opportunity to object, or otherwise render the annual notice inadequate, because it has no impact on the First Amendment rights protected by *Hudson* and *Abood*. The prophylactic procedural safeguards established in *Hudson* protect nonmembers' right not to subsidize the union's ideological activities. *Hudson*, 475 U.S. at 301-02. This right is grounded in freedom of conscience and belief, and protects nonmembers who are opposed to "ideological expenditures *of any sort* that are unrelated to collective bargaining." *Abood*, 431 U.S. at 235, 241 (emphasis added). "*[W]hatever the amount*, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear." *Hudson*, 475 U.S. at 305 (emphasis added). Because *Abood* and *Hudson* protect the right of employees who object to *any* use of their fees for nongermane purposes, a mere increase in the dollar amount of the fair share fee cannot require a supplemental notice and opportunity to object. *Abood* and *Hudson* protect the conscience, not the pocketbook.

The facts of this case do not require this Court to determine whether a supplemental notice could be required, for example, where a union with no history of significant nonchargeable political spending imposes a special assessment for that purpose. Respondent has a history of significant nonchargeable political spending of which nonmembers are made aware in each *Hudson* notice, and Respondent in fact *reduced* its annual spending on nonchargeable activities from 2004 to 2005 and 2006. Thus there was no departure from its "normal spending regime," as the dissent below suggested. Pet. App. 40a. Petitioners have not provided any evidence that *other* unions have abused *Hudson*'s procedures under such circumstances.[9]

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[9] Because nonmembers are fully informed in the annual *Hudson* notice that Respondent may spend their fees on nongermane political and ideological activities unless they object, there is no merit to Petitioners' assertion that the Ninth Circuit's decision would permit Respondent to "levy a massive assessment on the Nonmembers in August 2012 to influence the upcoming presidential election, thereby forcing those Nonmembers who had not previously objected to support financially that presidential campaign . . . *without giving them an opportunity to object* . . . ." Pet. Br. at 23-24 (emphasis added). Nonmembers would be given an opportunity to object in Respondent's annual *Hudson* notice, and it defies common sense to postulate that a nonmember who is informed of Respondent's significant political spending in the June 2012 *Hudson* notice will be surprised when a portion of his or her fee is later used for purposes relating to the presidential election.

Having been informed in June 2005 that their fees could be used for nongermane purposes (including nongermane political or ideological activities), and that their fees could increase without further notice, nonmembers who declined to object received all of the procedural protections required by the First Amendment and waived any challenge to their subsequent payment of the increase. They acquiesced as a matter of law in the use of their fees for such activities, and therefore were not compelled to provide Respondent with an "involuntary loan." *See Street*, 367 U.S. at 774 ("[D]issent . . . must affirmatively be made known to the union by the dissenting employee."); *Cumero v. Public Employment Relations Bd.*, 49 Cal.3d 575, 590 (1989) (under California law, the right to object "must be affirmatively asserted or else it is waived"); Cal. Gov't Code §§3515, 3515.7, 3515.8; *see also* discussion, *infra*, at 45-46.[10] Tellingly, fewer nonmembers filed objections in response to Respondent's June 2006 *Hudson* notice – which disclosed Respondent's use of the funds generated by the increase – than had done so in response to the June 2005 *Hudson* notice. *See* discussion, *supra*, at 5. There is thus no basis in the empirical evidence or the law to conclude that nonobjectors were deprived of information necessary to choose whether to object.

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[10] Amici Pacific Legal Foundation, *et al.*, urge the Court to abandon this rule and to require instead that nonmembers affirmatively authorize the use of their fees for nongermane purposes. Brief Amicus Curiae of Pacific Legal Foundation, *et al.*, at 17. This Court, however, does not consider a claim "raised by an amicus curiae where the petitioner has not pursued that claim in the petition for certiorari." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96 n.4 (1991); *United States v. Dion*, 476 U.S. 734, 736 n.3, 746 (1986). Considering such a claim would be particularly inappropriate here because amici ask this Court to both overrule well-established precedent and hold unconstitutional the California state laws authorizing Respondent's opt-out system. *See* Cal. Gov't Code §§3515, 3515.7, 3515.8. Amici offer no compelling justification for this Court to abandon its decision just four years ago that the First Amendment permits states to adopt *either* an opt-in *or* an opt-out system. *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181, 185 (2007). Amici's concerns about "non-conforming" employees are particularly misplaced in this case, which involves a sizable class of nonmembers, not a lone dissenter.

D. Petitioners' Proposed Revision of the *Hudson* Procedures Offers Less Protection to Nonmembers and Would Be Unworkable To Administer

When Respondent's expenditures are considered as a whole, the *Hudson* procedures followed here adequately protected nonmembers' First Amendment rights. Accordingly, the only questions before the Court are (1) whether a temporary dues and fee increase or a "special assessment" is constitutionally distinct from a "permanent, across-the-board increase in dues and fees for general purposes," Pet. Br. at 22-23, such that nonmembers must have a separate opportunity to object to supporting any nonchargeable activities funded thereby, and (2) whether, for the same reason, the applicable objector rate must be based on the union's predictions as to how those funds will be used, rather than on the prior year's actual, audited expenses. Because distinguishing temporary fee increases or assessments from other dues and fees paid by nonmembers would contravene fundamental principles of fair share fee jurisprudence while offering less protection to nonmembers than the existing *Hudson* procedures, the answer to both questions is "no."

1. This Court's Fee Jurisprudence Correctly Recognizes the Fungibility of Union Funds

As noted above, the objector fee rate charged by Respondent from July 2005 through June 2006 reflected the chargeable portion of Respondent's audited 2004 expenditures (56.35%), and during that period objectors paid *less* than their proportionate share of Respondent's total chargeable expenses. Nonetheless, Petitioners urge this Court to consider the increase in isolation, focusing solely on the fact that the objector rate exceeded the chargeable portion of Respondent's spending of the funds generated by the increase. This approach is contrary to the reality that a union's funds are fungible and to this Court's consequent recognition that whether objectors are being compelled to support nongermane activities cannot be determined by tracing the specific funds financing those activities.

The Court first recognized this fungibility principle in *Street*, explaining that, because money is fungible, a system in which a union collects fees from objectors in the amount of full member dues but spends those funds exclusively on chargeable activities does not adequately protect objectors' right to refrain from supporting nonchargeable activities. Instead, it "shift[s] a disproportionate share of the costs of collective bargaining to the dissenter and ha[s] the same effect of applying his money to support such political activities." 367 U.S. at 775. The Court applied the fungibility principle in *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 753 (1963), holding that a union accounting system in which "all collections from nonmembers [were] directly committed to paying bargaining costs" was "of bookkeeping significance only rather than a matter of real substance."

> If the union's total budget is divided between collective bargaining and [nonchargeable] expenses and if nonmember payments, equal to those of a member, go entirely for collective bargaining costs, the nonmember will pay more of these

> expenses than his pro rata share. The member will pay less and to that extent a portion of his fees and dues is available to pay [nonchargeable] expenses. . . . By paying a larger share of collective bargaining costs the nonmember subsidizes the union's [nonchargeable] activities.

Id. at 753-54; *see also Abood*, 431 U.S. at 238 n.35 ("It is plainly not an adequate remedy to limit the use of the actual dollars collected from dissenting employees to collective-bargaining purposes[.]").

These decisions establish that a union's funds are fungible; that its spending of the actual dollars received from nonmembers (to the extent they can be traced) is "of bookkeeping significance only;" *Schermerhorn*, 373 U.S. at 753; and that, accordingly, the question whether nonmembers have been compelled to support nonchargeable expenditures does not depend upon the specific source of the funds used by the union, but instead upon "the total union budget," *Street*, 367 U.S. at 775.

Petititioners ignore these fungibility principles as to the increase at issue here, but they cannot have it both ways. If objectors' fees must be reduced to reflect only their proportionate share of the union's total chargeable expenditures – regardless of the particular activities funded directly with objector fees – then objectors paying that reduced, proportionate fee cannot complain if the specific funds they contribute can be traced through the union's general account to spending on particular nonchargeable activities.[11]

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[11] *Street* specifically recognized that "assessments" are not constitutionally distinct from "regular dues and fees," and thus are not subject to a different objector fee rate. *Contra* Pet. Br. at 21. *Street* held that objector fees are properly defined as a percentage of "the dues, initiation fees and *assessments* uniformly required as a condition of acquiring or retaining union membership," and that the refund owed to objectors following an improper use of their fees should be based

Petitioners' disregard for the fungibility principle is particularly misplaced here. The fee paid by objectors – both before and after the increase – reflected their proportionate share of Respondent's chargeable expenditures, calculated on the basis of Respondent's audited 2004 expenditures. If the funds generated by the increase (which were not separately deducted from employee paychecks or placed into a separate bank account) were disproportionately spent on nonchargeable activities, Respondent consequently committed a proportionally greater proportion of its remaining funds to *chargeable* activities. After all, Respondent's total chargeable spending went up, not down, while the increase was in place, and the fee paid by objectors was ultimately *less* than their proportionate share of Respondent's chargeable activities during the 2005-2006 fee year. Moreover, Petitioners never appealed the District Court's conclusion that, from July through December 2006, Respondent properly applied the objector rate established in its June 2006 *Hudson* notice – reflecting Respondent's *total* chargeable expenditures in 2005 – to the increase. That Respondent paid for certain expenses with funds generated by the increase is "of bookkeeping significance only,"

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upon the "proportion that the expenditures for [nonchargeable] purposes which [they] had advised the union [they] disapproved bore *to the total union budget*." *Street*, 367 U.S. at 743-44, 775 (emphases added).

Even if "special assessments" were somehow constitutionally distinct from "dues and fee" increases, however, the increase at issue here was a temporary dues and fee increase, not a special assessment. The increase was collected over sixteen months, not as a one-time assessment, and the funds generated thereby were not legally restricted to specific purposes. Shortly after the increase expired, Respondent's dues *permanently* increased to 1.5% of gross wages, JA 219 – higher than the 1.25% rate while the increase was in effect.

not constitutional significance. *Schermerhorn*, 373 U.S. at 753.[12]

2. The Court's Fee Decisions Correctly Recognize the Superiority of a System Based on Objective, Independently-Verifiable Financial Reports Rather than Subjective Predictions

The other flaw in Petitioner's proposed substitute for the *Hudson* procedures is that the objector rate for a "special assessment" or temporary dues and fee increase would be determined not by the union's verified prior chargeable spending but on the basis of the union's *predictions* about how the funds generated thereby will be used in the future. That approach protects nonmembers less than the existing *Hudson* procedure, while needlessly burdening the union's statutory and contractual right to collect fair share fees.

As explained above, *Hudson* permits a union to base its objector fee on the chargeable percentage "of its expenses during the preceding year." 475 U.S. at 307 n.18. This "prior year" system benefits both nonmembers and unions by providing an objective, verifiable measure for objectors' fees. Rather than relying upon subjective predictions about how the union is likely to use its funds, the "prior year" system pegs the objector fee to the union's historical spending. The union's report of its expenditures in the prior year, and their chargeability or nonchargeability, is verified by an independent auditor. The report and the auditor's verification are sent to nonmembers with the union's annual *Hudson* notice and used to calculate the objector fee charged in the following year. *Id.*[13]

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[12] To the extent Petitioners contend that Respondent's "publicly-stated intention[]" to use the funds generated by the increase solely for purportedly nonchargeable political purposes made those funds non-fungible, Pet. Br. at 23 n.9, they both disregard Respondent's contemporaneous statements to the contrary, *see* Pet. App. 6a, and suggest a rule unrelated to the actual use of a union's funds and easily evaded by making different statements or remaining silent. Indeed, unions could make special assessments 100% *chargeable* by declaring that the funds generated thereby would be dedicated exclusively to chargeable activities, even if they simultaneously increased by a corresponding amount the percentage of their remaining income spent on nonchargeable activities.

This system serves nonmembers' First Amendment interests in several ways. It provides them with concrete, verifiable information to help them determine whether to object or to challenge the union's chargeability determinations. *See Hudson*, 475 U.S. at 306. Verification by an independent auditor at the union's expense – possible *only* in a "prior year" system because future expenditures cannot be audited – eliminates the risk that unions will manipulate their expense reporting, and relieves nonmembers of the burden of challenging the union's accounting practices. The system enables nonmembers to focus their attention on the two constitutionally relevant issues: whether they object to supporting nongermane activities, and whether the union has properly calculated the objector fee.

For unions, this "prior year" system has both costs and benefits. It forces unions to maintain careful financial accounting records, to pay for an annual audit, and to send nonmembers a verified annual report of those expenditures. It also prevents unions from increasing the objector fee above the chargeable proportion of their most-recently audited year's expenditures, even if they expect that the chargeable proportion of their expenditures during the coming fee year will be significantly higher. The system is practicable, however, because it does not put unions to the impossible task of predicting accurately how they will spend their funds in the future. It also enables them to spend their existing funds as needed – i.e., to exercise their "right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters' such exactions in support of political activities," *Abood*, 431 U.S. at 240 n.40 (citation omitted) – without fear of litigation if their expenditures ultimately differ from their projections.

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[13] For extremely small public employee unions with few expenditures, *Hudson*'s "independent verification" requirement may be satisfied by providing nonmembers with "adequate accessible information using an auditor verifiable methodology," rather than a full-blown audit. *See, e.g.*, *Harik v. Cal. Teachers Ass'n*, 326 F.3d 1042, 1049 (9th Cir. 2003), *cert. denied*, 540 U.S. 965 (2003).

The fee paid by objectors during any given year will inevitably differ from the union's actual chargeable expenses during that time under this "prior year" system. However, this consequence (which is also inherent in any "predictive" approach) is outweighed by the benefits of having an objective measure for calculating objector fees that is independently verifiable, accounts for all of the union's spending, and cannot easily be manipulated.

By contrast, an approach based upon predictions about the union's future spending is subjective, non-verifiable, and subject to manipulation. Under such a predictive approach, objectors must rely upon the union's subjective predictions about its future spending to determine whether the objector fee is "accurate," because there is no way for a union to base its fee calculation on predictions about future spending while also complying with *Hudson*'s instruction that its notice must include "verification by an independent auditor." 475 U.S. at 307 n.18.[14]

Because it cannot be independently verified, a predictive approach is easily manipulable – a problem exacerbated by its failure to base the objector fee on *total* union expenditures. Under *Hudson*'s "prior year" system, that fee is calculated on the basis of "'total union expenditures'" during the preceding year. *Id.* at 306 (quoting *Abood*, 431 U.S. at 239 n.40); *see also Lehnert*, 500 U.S. at 524. If a union increases its nonchargeable spending in a particular year – through funds from a "special assessment" or otherwise – that increase is reflected in the next *Hudson* notice and causes a corresponding reduction in the objector fee. A "predictive" approach is more prone to manipulation because the union can pick and choose which categories of spending to fund with "regular dues and fees" subject to the usual objector fee rate, and which to fund through special assessments subject to a different rate. A union could implement a "special assessment" to fund entirely *chargeable* activities and collect *one hundred percent* of that assessment from nonmembers – even if its prior *Hudson* notice establishes a much lower objector fee rate – thereby evading *Street*'s requirement that the objector fee reflect the chargeable percentage of a union's *total* expenditures.

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[14] Even if this predictive approach were limited to situations in which there are clear reasons to expect a change in the chargeable percentage of the union's expenditures, that exception to the prior year system would offer no more protection to nonmembers; the prior year system already ensures that, over time, objectors pay no more than their proportionate share of the union's chargeable expenses. Moreover, such an exception would necessarily apply to annual *Hudson* notices as well as mid-year changes. In this case, the exception would have permitted Respondent to establish a *higher* objector fee, because it was foreseeable both when Respondent's June 2005 *Hudson* notice was issued and when the increase was implemented that its nonchargeable expenditures in 2005 and 2006 would be lower than they were in 2004, a presidential election year.

The "predictive" approach would also impose significant burdens on the statutory and contractual right of public employee unions to collect and use fair share fees. Predicting accurately how funds collected through an assessment or increase will be spent is an impossible task, given the inevitable fluctuations in union spending and the emergencies to which unions often must respond. As a result, that approach would engender significant litigation over the "accuracy" of a union's predictions.

The facts of this case demonstrate the difficulty of establishing a workable standard of "accuracy." Petitioners have asserted throughout this litigation that Respondent intended to devote the funds raised by the increase *exclusively* to Respondent's purportedly nonchargeable opposition to two ballot initiatives, and that Respondent should be taken "at its word" as to how the funds were to be spent. Pet. Br. at 5, 22 n.8. However, the funds generated by the fee increase were never devoted exclusively to nonchargeable activities, but to a mix of chargeable and nonchargeable activities, as Respondent made clear at the time. Pet. App. 6a ("[T]he Union specifically stated it intended to split the increase 'between political actions and collective bargaining actions.'"); Record 6 at Exh. A. Indeed, both initiatives appeared on the November *2005* ballot, while the fee increase was collected through December *2006* – long after the initiatives failed to pass. Subsequent audits confirmed that the funds were in fact used for a mix of chargeable and nonchargeable activities, including nearly $1 million in indisputably chargeable spending for collective bargaining negotiations and ratification. Pet. App. 6a; JA 258.

The majority and the dissenting opinions below differed in the proper weight to give Respondent's statements and its actual use of the funds. The predictive approach would require this Court to determine, at the very least, what statements by a union are admissible and relevant as evidence of an increase's "intended" use; whether the actual use of the funds is relevant in evaluating the adequacy of a union's predictions; and whether the standard for assessing those predictions is good faith, ultimate accuracy, reasonable accuracy, or another standard. Even if these questions were resolved, unions and objectors would disagree about the application of that standard to particular cases and burden the courts with the resulting litigation.

These problems are inherent in any "predictive" approach. Significant additional burdens would be created, however, if the courts were to *bind* unions to their predictions in such a supplemental notice. Such a rule would prevent unions from responding to unforeseeable emergencies requiring spending different from that predicted in the supplemental notice, and thereby significantly restrain the exercise of their First Amendment rights. *Hudson*'s "prior year" system ensures that objectors pay only their proportionate share of the union's chargeable expenditures while leaving unions free to respond to changing circumstances in a timely fashion. *See, e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring) (because "timing is of the essence in politics . . . . it is often necessary to have one's voice heard promptly, if it is to be considered at all").

In short, the "predictive" approach both ignores the reality that a union's funds are fungible and offers less protection for nonmembers' First Amendment rights, while imposing significant additional burdens on unions and creating numerous roadblocks to the efficient resolution of fee-related disputes. Petitioners' proposed alternative to the procedure established in *Hudson* is both unnecessary and counterproductive.

II. This Court's Fair Share Fee Decisions and its Other Decisions Involving Procedural First Amendment Rights and Public Employee Speech Demonstrate that Strict Scrutiny Is Inapplicable Here

The narrow dispute here is whether the specific procedures approved by this Court in *Hudson* and implemented by Respondent in this particular case were adequate to protect nonmembers' First Amendment rights. Nonetheless, Petitioners offer an abstract argument that First Amendment "strict scrutiny" applies to a union's procedures for collecting fair share fees, concluding that considerations of practicality and administrability have no place in that analysis. Pet. Br. at 11-19. Applying strict scrutiny in this manner, however, would be contrary to this Court's prior fair share fee precedents and its other relevant precedents involving procedural First Amendment rights and public employee speech.

A. Fair Share Fee Precedents

As an initial, dispositive matter, this Court's fair share fee precedents do not apply "strict scrutiny" to determine the constitutional adequacy of the procedures used to collect public employee fees.

To begin with common ground, no party disputes the substantive First Amendment right of fee payers not to subsidize ideological activities they oppose. *Abood*, 431 U.S. at 235. In evaluating whether that right has been infringed, this Court applies the "germaneness" standard: Is the expenditure of nonmembers' fees "germane to [the union's] duties as collective-bargaining representative"? *Id.* As *Lehnert* subsequently elaborated, "[C]hargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." 500 U.S. at 519.[15] This standard governs objectors' substantive First Amendment challenges. If an expenditure satisfies the *Lehnert* standard, it may constitutionally be charged to objectors; if the expenditure does not, it may not. No application of "strict scrutiny" is required.[16]

The dispute regarding Petitioners' rights under *Hudson* does not involve their substantive First Amendment rights, however. *Hudson* rights are prophylactic *procedural* rights that "insure that the government treads with sensitivity in areas freighted with First Amendment concerns." 475 U.S. at 303 n.12. In establishing those rights, *Hudson* did not apply any form of "strict scrutiny." Instead, the Court asked what procedures would provide "adequate[]" protection, 475 U.S. at 302, in light of both nonmembers' substantive First Amendment rights, *id.* at 305-07, and practical reality, *id.* at 307 n.18. The Court's goal was "'to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.'" *Id.* at 302 (quoting *Abood*, 431 U.S. at 237).

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[15] *Lehnert* did not alter the fundamental holding in *Hanson* and *Abood* that expenditures for core collective-bargaining activities are not subject to *any* constitutional scrutiny, let alone "strict scrutiny."

[16] Petitioners' suggestion that the second and third prongs of the *Lehnert* test are "functionally identical" to strict scrutiny, Pet. Br. at 14, is too facile. The third prong prohibits only those fees that *significantly* add to the infringement of First Amendment rights, rather than prohibiting all fees going *any* further than necessary to serve a compelling interest. Likewise, the second prong does not require proof of a "compelling government interest," but simply prohibits fair share fees for purposes other than furthering labor peace and alleviating the free rider problem.

Applying this framework, *Hudson* articulated the elements of a constitutionally sufficient fee collection procedure, while rejecting several requirements that were impractical or that gave too little consideration to union interests – but that would have been necessary were the court applying strict scrutiny's "least restrictive means" test. *See, e.g., id.* at 307 n.18 (rejecting requirement that nonmembers receive "exhaustive and detailed list of all its expenditures" and that union ensure "absolute precision in the calculation of the charge to nonmembers"); 308 n.21 (rejecting assertion that the "constitutional minimum" includes "a full-dress administrative hearing, with evidentiary safeguards"). The "carefully tailored" procedures established by *Hudson* define fee payers' procedural rights – not strict scrutiny.[17]

Any residual doubt about the scrutiny applied in this Court's prior fee decisions is dispelled by the deference they exhibit to legislative judgments about the benefits of agency shop agreements. *See, e.g., Hudson*, 475 U.S. at 301 n.8 (Court has always "accorded great weight to the congressional judgment that it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its cost") (citation omitted); *Abood*, 431 U.S. at 224-25 (Court's "province is not to judge the wisdom of [a state's] decision to authorize the agency shop in public employment"); *Hanson*, 351 U.S. at 234 ("[t]he decision [whether to permit agency shop agreements] rests with the policy makers, not with the judiciary," because "[t]he ingredients of industrial peace and stabilized labor-management relations are numerous and complex" and "may well vary from age to age and from industry to industry"). Such deference to legislative judgments, though reflecting the constitutional separation of powers, is inconsistent with any contention that those decisions apply "strict scrutiny."

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[17] Petitioners emphasize *Hudson*'s statement that a union's fee collection procedures should be "carefully tailored to minimize the infringement" of First Amendment rights, and its citation, in a footnote, of decisions applying heightened scrutiny to laws infringing *substantive* First Amendment rights. *Id.* at 303 & n.11; *see* Pet. Br. at 14 & n.4. The mode of analysis actually employed in *Hudson*, however, was inconsistent with strict scrutiny, and *Hudson* nowhere stated that, by citing substantive First Amendment cases, it intended to invoke strict scrutiny or eliminate any distinction between substantive First Amendment rights (which are sometimes measured by strict scrutiny) and procedural First Amendment rights (which never are). That footnote simply cataloged areas in which the First Amendment requires the government to "tread[] with sensitivity." 475 U.S. at 303 n.12.

B. Expressive Association and Compelled Speech

Largely ignoring these decisions, Petitioners argue that strict scrutiny applies to a public employee union's fee collection procedures because any compulsory payment of fair share fees to such a union constitutes a form of "compelled expressive association." *See, e.g.*, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); Pet. Br. at 12. Petitioners' reliance on those decisions is misplaced in the first instance because the *Hudson* notice dispute here centers not on Petitioners' substantive First Amendment right to decline to support nonchargeable activities, but on the prophylactic procedures that unions must implement to protect that right. Even as to fee payers' substantive First Amendment rights, however, Petitioners' reliance upon this Court's "expressive association" decisions is misplaced.

More than fifty years ago, this Court held in *Hanson* that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate either the First or the Fifth Amendments." 351 U.S. at 238. *Hanson* specifically rejected the claim that such a requirement "forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights." *Id.* at 236. This Court has repeatedly affirmed that holding. *See, e.g.*, *Locke*, 555 U.S. at 209-10; *Lehnert*, 500 U.S. at 517. Under this Court's precedents, "compelled subsidies" such as fair share fees are constitutionally distinct from "compelled speech," *see Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 565 & n.8 (2005), and do not warrant strict scrutiny under the First Amendment, *see, e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 409-10, 413-16 (2001); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 473-74 (1997).

These decisions reflect the significant difference between the statutes at issue in *Dale* and *Roberts* and the payment of fair share fees to a public employee union. Those statutes infringed upon rights of expressive association because, by prohibiting the plaintiff groups from excluding certain individuals, they interfered with the groups' "ability to express [their own] message[s]." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006) ("*FAIR*"). In *Dale*, "'the forced inclusion of [a homosexual scoutmaster in the Boy Scouts] significantly affect[ed] [the Boy Scouts'] expression.'" *Id.* at 68 (quoting *Dale*, 530 U.S. at 655-59). In *Roberts*, the requirement that the Jaycees extend membership to certain excluded individuals "impair[ed] the ability of the original members to express only those views that brought them together." 468 U.S. at 623.

In *FAIR*, by contrast, the requirement that law schools "associate" with military recruiters did not violate the schools' right of expressive association because the "compelled association" did not affect their ability to communicate their message of nondiscrimination. *FAIR*, 547 U.S. at 69-70. Petitioners' invocation of the right to expressive association is misplaced for the same reason. The requirement that employees provide financial support to their bargaining representative has no impact or effect upon their ability to express any message they choose and does not interfere with the ability of any expressive association to communicate its chosen message. Nonmembers are individuals, not groups, and do not allege that they comprise an expressive association whose ability to communicate its message is impaired by the compulsory payment of fair share fees. Nonmembers remain free to communicate their opinions, to join expressive associations, and to engage in whatever other First Amendment-protected activity they wish.[18]

Petitioners' reliance on compelled-speech precedents, *see* Pet. Br. at 17, is similarly misplaced. A compelled-speech violation occurs only where "the complaining speaker's own message [is] affected by the speech it [is] forced to accommodate." *FAIR*, 547 U.S. at 63. A requirement that nonmembers provide financial support to their collective bargaining representative has no effect on nonmembers' ability to express messages of their own choosing, or to express no message if they prefer. Because there is no risk that the union's views will be attributed to nonmembers, Petitioners also are not forced to accommodate speech with which they disagree. *Id.* at 65; *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980) (no compelled speech violation where plaintiffs were "free to publicly dissociate themselves from the views of the speakers or handbillers" on their property); *see also Johanns*, 544 U.S. at 565 & n.8 (distinguishing "compelled speech" precedents from "compelled subsidy" cases).[10]

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[18] The "compelled association" here poses even less of a risk that Petitioners will be associated with a disfavored message than the statute in *FAIR*. The schools in *FAIR* had to provide military recruiters with access to their recruiting services, to allow recruiters on campus, and to send emails and distribute flyers on behalf of recruiters. *Id.* at 60-61. Fee payers simply have a fee deducted from their wages and forwarded to the union; they have no public association with the union.

Finally, Petitioners argue that strict scrutiny is required because nonmembers' payment of the increase constituted an involuntary "political loan" that "enhance[d] SEIU's political speech." Pet. Br. at 18-19. Nonmembers, however, made no such loan to Respondent. *See* discussion, *supra*, at 14-16. And in any event, there is no merit to Petitioners' claim that actions by the State that purportedly enhance a particular group's political speech are subject to the same level of scrutiny as regulations that substantially *burden* core political speech, such as the Arizona statute struck down in *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, __ U.S. __, 131 S.Ct. 2806 (2011). To the contrary, *Bennett* emphasized that the "enhancement" of a group's speech through a viewpoint-neutral state regulation – here, a statute permitting fair share fee payments to the bargaining representative chosen by a majority of the employees in a public sector bargaining unit – has never triggered strict scrutiny. *See id.* at 2822 (distinguishing cases involving viewpoint-neutral subsidies for political speech that did not burden others' speech); *id.* at 2837 (Kagan, J., dissenting) ("We have never, not once, understood a viewpoint-neutral subsidy given to one speaker to constitute a First Amendment burden on another."). Indeed, the government may subsidize the political activities of some organizations but not others, *Regan v. Taxation With Representation*, 461 U.S. 540, 546-51 (1983), or confer a privileged position in "the policymaking process" on particular collective bargaining representatives, *Minn. State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 288-90 (1984); *cf. Buckley v. Valeo*, 424 U.S. 1, 57, 92-108 (1976) (upholding federal statute providing for public financing of presidential elections, including provisions granting "major parties" greater funding than "nonmajor parties").

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[10] Petitioners cite *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781 (1988), to suggest that fair share fee arrangements constitute content-based regulations of speech. Pet. Br. at 18. The statute at issue in *Riley* required "professional fundraisers" to "disclose to potential donors, *before an appeal for funds*, the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity." 487 U.S. at 795 (emphasis added). That statute was content-based not simply because it compelled certain disclosures of information, but because the compelled disclosures were *triggered by the content* of the fundraisers' non-compelled speech. Here, the requirement to pay fair share fees is not triggered by, and has no relation to, the content of nonmembers' speech.

In short, this Court's expressive association and compelled-speech precedents do not suggest that the compulsory payment of fair share fees, standing alone, triggers heightened First Amendment scrutiny. Under *Abood* and its progeny, nonmembers' substantive First Amendment rights are infringed only where such compulsory fees are used to support "ideological activities unrelated to collective bargaining." 431 U.S. at 236.

C. Procedural First Amendment Rights and Public Employee Speech

Although the non-fair share fee precedents upon which Petitioners rely in invoking strict scrutiny are irrelevant, several First Amendment precedents outside of the fair share fee context are relevant to the issue presented here and further counsel against applying strict scrutiny.

Under this Court's general approach to procedural First Amendment rights, the constitutional necessity of a particular procedure "turn[s] on the particular context in which the question arises – on the cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase." *Waters*, 511 U.S. at 671 (O'Connor, J.). In considering the limitations imposed by the First Amendment upon state defamation lawsuits, for example, the Court "balance[s] the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757 (1985) (Powell, J.); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974) (seeking a "balance between the needs of the press and the individual's claim to compensation for wrongful injury"). Accordingly, when procedural First Amendment rights such as fee payers' "notice" rights are at issue, the Court does not apply "strict scrutiny" but instead takes account of all relevant interests – as it did in *Hudson*.[20]

Waters v. Churchill is particularly instructive. Like *Hudson* and the present case, it involved the procedural First Amendment rights of public employees – specifically, whether public employees have the right to a reasonable investigation before they are disciplined for speech that might have been protected by the First Amendment. 511 U.S. at 677-78. The *Waters* Court was deeply fractured as to that right, but no Justice contended that public employees have a right to employment procedures imposing the least possible burden on their First Amendment rights. To the contrary, Justice Scalia argued in a concurrence joined by Justice Thomas and Justice Kennedy that the procedural right recognized by the plurality was improper because the Court had previously recognized such rights *only* in cases involving "alleged governmental deprivation of the freedom of speech specifically *through the judicial process*." *Id.* at 686-89 (Scalia, J., concurring in the judgment).[21]

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[20] The Court's defamation decisions demonstrate that this approach applies even where the interests opposing recognition of a procedural right arise not under the Constitution but under statute, contract, or common law. *Gertz* accounted for both the substantive First Amendment rights of defamation defendants and "the strong and legitimate" – but certainly not constitutional – "state interest in compensating private individuals for injury to reputation." 418 U.S. at 348. Thus, the fact that nonmembers have a First Amendment right not to support nonchargeable activities does not mean that a union's statutory and contractual right to collect fair share fees can be disregarded when assessing the adequacy of its fee procedures.

Applying strict scrutiny here would also be contrary to this Court's public employee speech cases. The Court has long recognized that "there is a crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate or license, as lawmaker, and the government acting as proprietor, to manage its internal operation." *Engquist v. Or. Dep't of Ag.*, 553 U.S. 591, 598 (2008) (citations omitted). In cases involving public employee speech, this Court does not apply strict scrutiny but instead seeks "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. The courts employ "a fact-sensitive and deferential weighing of the government's legitimate interests." *Bd. of County Comm'nrs v. Umbehr*, 518 U.S. 668, 677 (1996).

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[21] Justice Stevens dissented from the plurality's decision regarding the substantive scope of the First Amendment, but did not challenge the plurality's failure to apply strict scrutiny. *Id.* at 694-99 (Stevens, J., dissenting).

The present dispute is covered by the *Pickering* standard. Petitioners' constitutional claims arise only because their employer, the state of California, is a public entity. The California laws authorizing Respondent's fair share fee help the state maintain "industrial peace and stabilized labor-management relations." *Hanson*, 351 U.S. at 234. "The desirability of labor peace is no less important in the public sector [than elsewhere], nor is the risk of 'free riders' any smaller." *Abood*, 431 U.S. at 224. The interest justifying Respondent's fair share fee arrangement is therefore the exact government interest involved in other public employee speech cases – the interest in providing government services in an efficient and effective manner. *Engquist*, 553 U.S. at 598. *Abood* and *Hudson* consequently applied a test consistent with the *Pickering* standard. *Abood* held that public employers' interests in labor peace and stability overcome any purported impact of fair share fees on public employees' First Amendment rights, 431 U.S. at 222, while *Hudson* accommodated both the public employees' substantive First Amendment rights and the union's statutory and contractual right "to require every employee to contribute to the cost of collective-bargaining activities," *Hudson*, 475 U.S. at 302. There is no principled reason to distinguish those decisions and their progeny from this Court's other public employee speech decisions.[22]

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[22] Petitioners rely heavily upon *Elrod v. Burns*, 427 U.S. 347 (1976), in which a plurality of the Court argued that strict scrutiny, not *Pickering* balancing, applies in public employee speech cases. *See id.* at 363 (Brennan, J.). That approach to public employee speech, however, has never commanded a majority of this Court, and this Court has never extended *Elrod*'s application of strict scrutiny to contexts other than political patronage in public employment. To the contrary, the Court has since clarified that *Pickering*'s balancing test – *not* strict scrutiny – applies even in the patronage context. *See Umbehr*, 518 U.S. at 673.

Finally, applying strict scrutiny here would be inconsistent with the manner in which this Court has applied *Abood* and *Hudson* in other contexts, most notably mandatory state bar associations. *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), found a "substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other," *id.* at 12, and held on that basis that state bars can "fund activities germane to [their statutory purpose] out of the mandatory dues of all members," *id.* at 14. *Keller* also explained that applying *Abood*'s "germaneness" standard to state bars bar would not be overly onerous because "an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson*." *Id.* at 17.

Adopting Petitioners' argument for strict scrutiny would require this Court to revisit and overturn *Keller*'s ruling that integrated bar associations are permitted to charge members for germane activities. *Keller* recognized that the interest justifying the creation of an integrated bar is the organized bar's preference for "a large measure of self-regulation to regulation conducted by a government body which has little or no connection with the profession," *id.* at 12, an interest almost certainly not "compelling" for purposes of strict scrutiny. Moreover, *Keller* noted that "members of the State Bar concededly do not benefit as directly from its activities as do employees from union negotiations with management," *id.*, suggesting that the integrated bar requirement is not adequately tailored to the government's interests. And if strict scrutiny applies to the *procedural* rights of fee payers, as Petitioners contend, every state bar will have to revisit the procedures it implemented based on *Keller*'s holding, reached without applying strict scrutiny, that the specific procedures established in *Hudson* were "certainly" sufficient. *Id.* at 17.

III. Petitioners' Argument that Nonmembers Were Impermissibly Charged Proposition 76 Expenditures Is Not Properly Presented and Is Meritless

Petitioners contend that nonmembers were compelled to pay for Respondent's opposition to Proposition 76, an initiative on California's November 2005 ballot, and contend that those expenditures were nonchargeable. Pet. Br. at 24-39. However, Petitioners never pursued such a claim below, but disavowed it, as is apparent from the fact that the text of Proposition 76 and its legislative history are not contained anywhere in the record of this case. Instead, Petitioners direct the Court to the internet. *See* Pet. Br. at 36 nn.17-19; *id.* at 37 n.20. The Ninth Circuit addressed the issue in a passing footnote suggesting (without holding) that such expenditures *might* be chargeable, but the issue is not properly presented here. If the Court does reach the chargeability claim, however, it should reject the claim on the merits.

A. Petitioners Never Pursued a Chargeability Claim

There is a fundamental difference between procedural challenges to the collection of fair share fees and substantive challenges to the spending of those fees. The former, known as "notice" or "*Hudson*" challenges, contest whether a union provided appropriate procedural protections to nonmembers, under the standards announced in *Hudson*. The latter, known as "chargeability," "spending," or "*Lehnert*" challenges, contest whether a union can compel nonmembers, over their objection, to pay for certain expenditures without violating their substantive First Amendment rights. *See Lehnert*, 500 U.S. 507. The two inquiries are separate, and mischaracterizing an expenditure as "chargeable" does not render the *Hudson* notice inadequate. "*Hudson* governs the adequacy of information, while *Lehnert* governs chargeability. There is a procedure for challenging the amount of the fees, but this procedure is

not encompassed in a *Hudson* challenge." *Wagner v. Professional Engineers in California Gov't*, 354 F.3d 1036, 1047 (9th Cir. 2004); *see generally id.* at 1046-47; *Jibson v. Mich. Educ. Ass'n-NEA*, 30 F.3d 723, 730 (6th Cir. 1994); *Hudson v. Chicago Teachers Union, Local No. 1*, 922 F.2d 1306, 1314 (7th Cir. 1991). Even a notice containing an incorrect chargeability determination provides nonmembers with all the "notice" that *Hudson* requires: the major categories of the union's actual expenditures and the union's chargeability determinations, the right to object to paying for nonchargeable expenditures, and the procedure to challenge chargeability.

At no time in the present case did Petitioners litigate a "chargeability" claim; rather, they litigated only a "notice" claim and eschewed any "chargeability" claim. "Plaintiffs explicitly concede theirs is only a procedural notice challenge, not a challenge to the Union's actual spending of the fees." Pet. App. 13a n.4. Petitioners asserted that "[t]his case . . . is *solely* about whether Defendants have complied with *Hudson*," Docket No. 45 at 6 (emphasis added), and reiterated their exclusive concern with *Hudson*'s procedural protections, *see, e.g., id.* at 15 ("Defendants' imposition of an increase in dues and fees in the absence of proper notice forms the basis of Plaintiffs' Complaint."); *see also id.* at 8, 10. Petitioners thereby waived any chargeability claim and cannot raise it for the first time in this Court. *See, e.g., Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (claim under Civil Rights Act of 1875 cannot be raised for the first time before the Supreme Court, where complaint raised only claims under the Civil Rights Act of 1871).

Nonmembers have ample avenues to pursue chargeability challenges. First, they can submit a challenge in response to Respondent's *Hudson* notice, which will promptly be resolved under the American Arbitration

Association's rules. *See* JA 103, 159, 224-25; *see also Hudson*, 475 U.S. at 307-08. Indeed, the 2005 arbitration of class members' challenges addressed both the propriety of the increase and the applicable objector rate. *See* Record 66 at Exh. B. Second, nonmembers can file an administrative charge with the Public Employment Relations Board, pursuant to Cal. Gov't Code §3515.8. Finally, nonmembers can pursue a chargeability challenge under 42 U.S.C. §1983, but, unlike Petitioners here, they actually have to litigate that challenge in the district court. The present case involves none of these procedures.

Petitioners' new chargeability claim is particularly inappropriate as to nonobjectors, for whom it would not be cognizable even if properly asserted and preserved below. Unions may charge nonmembers the equivalent of union dues, absent an affirmative objection. "[D]issent is not to be presumed – it must affirmatively be made known to the union by the dissenting employee," and for that reason a union cannot "in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities." *Street*, 367 U.S. at 774; *accord Hudson*, 475 U.S. at 306 n.16; *Abood*, 431 U.S. at 238; *Allen*, 373 U.S. at 119.

Chargeability challenges cannot be brought on behalf of a class of all nonmembers, or indeed any class containing nonobjectors, because objection cannot be presumed and many nonmembers do not object to paying for nonchargeable expenditures. This has been the settled law since *Street*, in which this Court refused to award relief to a class including all nonmembers: "Any remedies . . . would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object. . . . *[O]nly those who have identified themselves as opposed to political uses of their funds are entitled to* *relief in this action.*" 367 U.S. at 774 (emphasis added); *accord Allen*, 373 U.S. at 119 (chargeability challenge "is not and cannot be a class action").

Nor does Petitioners' *Hudson* "notice" claim depend on whether Respondent's Proposition 76 expenditures were chargeable. The accuracy of a union's application of the *Lehnert* standard for chargeability as to one particular expense is irrelevant to the adequacy of its *Hudson* notice. For that reason, Petitioners not only disavowed any chargeability claim, but expressly repudiated even the *issue* of whether Respondent's Proposition 76 expenditures were chargeable, asserting that it was "not relevant to consideration of the Employees' claim for violation of the pre-seizure notice and procedural safeguards mandated by *Hudson* (and therefore, not material to a summary judgment motion in such a case)." Ninth Circuit Opposition Br. at 44-45 n.25. Moreover, Respondents did not dispute on summary judgment the accuracy of Respondent's chargeability determinations, including those in the June 2006 *Hudson* notice disclosing the expenditures funded by the increase. *See* JA 67, 71-72, 76. On the basis of Petitioners' concessions, the Ninth Circuit properly concluded, "Plaintiffs explicitly concede theirs is only a procedural notice challenge, not a challenge to the Union's actual spending of the fees. . . . [A]ccording to Plaintiffs, chargeability is immaterial to their challenge . . . ." Pet. App. 13a at n.4.

The chargeability issue was neither necessary to nor decided in the decision below. Resolving it here would constitute an advisory opinion. *See, e.g.*, *United States v. Evans*, 213 U.S. 297, 299-301 (1909).

B. Nonmembers Were Not Compelled To Support Respondent's Proposition 76 Expenditures

If the Court nonetheless addresses Petitioners' "chargeability" challenge, it should reject it on the merits without reaching the issue whether the Proposition 76 expenses were chargeable. Even if those expenses – and indeed, all of the spending financed by the increase – were nonchargeable, no nonmembers were compelled over their objection to pay more than their proportionate share of Respondent's chargeable expenditures.

First, objectors' fair share fees both before and after the increase amounted to only 56.35% of members' dues during this period. Pet. Br. at 3, 5; *see also* JA 67, 309, 314, 318. However, no less than 66.26% of Respondent's expenditures during 2005 (the year that Proposition 76 was on the ballot) funded chargeable activities – even if all of the spending from the increase were deemed nonchargeable. *See* discussion, *supra*, at 5 & n.6.[23] Not only did objectors not subsidize Respondent's nonchargeable expenditures, they did not even pay their proportionate share of Respondent's *chargeable* spending. Even if Respondent's opposition to Proposition 76 and the other activities funded by the increase were considered nonchargeable, objectors simply did not provide financial support for those activities.

Second, the claim that nonmembers were compelled over their objection to pay for nonchargeable Proposition 76 expenditures must also fail as to nonobjectors. They were informed by Respondent's June 2005 *Hudson* notice that, absent an objection, they could be charged for nonchargeable expenditures (including nonchargeable political expenditures), and that the dollar amount of their fee could increase during the fee year. *See* discussion, *supra*, at 2. Under both state law and *Street*, nonmembers who chose not to object after receiving that notice acquiesced in the use of their fees for such purposes. *See Street*, 367 U.S. at 774.; Cal. Gov't Code §§3515.7(a) & (b), 3515.8; *see also* discussion, *supra*, at 20, 45-46.[24]

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[23] There is no evidence in the record that Respondent made any Proposition 76 expenditures in 2006, after its defeat in November 2005. Indeed, all political expenditures from the fee increase in 2006 were classified as nonchargeable. *See* JA 258. Even if Respondent had made Proposition 76 expenditures in 2006, however, the objector rate would still have been less than Respondent's chargeable expense rate in 2006 (56.35% vs. no less than 57.38%). *See* discussion, *supra*, at 6 & n.7.

C. The Ninth Circuit's Discussion Was Correct

For the foregoing reasons, there is no reason to consider the Ninth Circuit's passing footnote regarding the Proposition 76 expenditures. Nonetheless, that discussion was not erroneous.

The footnote reads, in relevant part:

> [N]ot all political expenses are automatically nonchargeable. Rather, if germane to collective bargaining, they can be chargeable just like any other expense. *See, e.g.*, *Lehnert*, 500 U.S. at 520, 111 S.Ct. 1950; *Foster v. Mahdesian*, 268 F.3d 689, 692 n.6 (9th Cir. 2001); *Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 853, 859–60 (D.C.

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[24] The rule limiting relief in chargeability actions to *actual* objectors would apply even if this Court concluded that Respondent should have issued a second 2005 *Hudson* notice to all nonmembers before instituting the increase. *Street* prohibits the conclusion that nonobjectors were unlawfully compelled to support Respondent's opposition to Proposition 76 simply because they did not receive a second *Hudson* notice. Instead, the proper remedy under such circumstances would be to provide nonmembers who failed to object in response to the June 2005 *Hudson* notice with a new notice and a new opportunity to object, to claim a refund of the nonchargeable amount paid, and to challenge Respondent's calculation of that amount. Here, however, Respondent has already provided the class with an opportunity to obtain a refund of the full amount paid, chargeable and nonchargeable, so there is no chargeability issue. *See* Respondent's Motion to Dismiss as Moot.

> Cir. 2006) (regulation allowing employer to unilaterally abrogate collective bargaining agreements fundamentally diminishes a union's bargaining position and nullifies the right to collective bargaining). Here, Proposition 76 would have effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances, undermining the Union's ability to perform its representation duty of negotiating effective collective bargaining agreements.

Pet. App. 6a n.2. Nowhere did the Ninth Circuit *conclude* that the Proposition 76 expenditures were chargeable; rather, it merely suggested that those expenditures might be considered chargeable because Respondent cannot fulfill its role as collective bargaining representative unless it can be assured that the agreements it negotiates will be binding on the employer. Petitioners fault the Ninth Circuit for failing to apply all three prongs of the chargeability test set forth in *Lehnert*, *see* Pet. Br. at 25-29, but the Ninth Circuit's cursory analysis merely demonstrates that it did not actually resolve the chargeability question.

If analyzed under *Lehnert*, however, the Proposition 76 expenditures were chargeable. Unlike the expenditure at issue in *Lehnert* – a lobbying effort to raise funds for public schools in general, not tied to any funding for teachers represented by the union – Respondent's Proposition 76 expenditures were not "attenuated" from collective bargaining at all, but instead related directly to the "implementation of [Petitioners'] collective-bargaining agreement. *Lehnert*, 500 U.S. at 520, 527. Petitioners agree that political expenditures related to implementing a labor agreement are chargeable. Pet. Br. at 10.

"Proposition 76 would have effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances, undermining the

Union's ability to perform its representation duty of negotiating effective collective bargaining agreements." Pet App. 7a n.2. Lobbying against abrogation of a union's agreements is certainly "*relate[d]* . . . to the . . . implementation of" those agreements, since an agreement that is abrogated will no longer be "implement[ed]." *Lehnert*, 500 U.S. at 520 (emphasis added). Moreover, giving the Governor authority to abrogate Respondent's agreements would have interfered with Respondent's *current* ability to fulfill its statutory obligation to negotiate the *next* agreement. *See Chertoff*, 452 F.3d at 853, 859–60.[25] As such, the Proposition 76 expenditures meet *Lehnert*'s "germaneness" test.[26]

Respondent's Proposition 76 expenditures also satisfy the second element of the *Lehnert* test: whether charging fee payers is "justified by the government's vital policy interest in labor peace and avoiding 'free riders.'" 500

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[25] The Ninth Circuit's characterization of the effect of Proposition 76 was fair. *Contra* Pet. Br. at 35-37. The Proposition would have given the Governor the authority "'to reduce appropriations of the Governor's choosing, including employee compensation/state contracts,'" *id.* at 36 (quoting the Official Title & Summary Prepared by the Attorney General), and this authority would apply to "'[a]ny General Fund spending related to contracts, collective bargaining agreements, or entitlements for which payment obligations arise after the effective date of this measure . . . .,'" *id.* at 37 (quoting the Legislative Analyst's "Proposition 76: School Funding; State Spending; Initiative Constitutional Amendment"). Since "payment obligations" under collective bargaining agreements do not arise until the work covered by those agreements is performed, the Proposition would have given the Governor the authority to reduce appropriations for the payment of wages and benefits for work performed after the Proposition was enacted, effectively eliminating positions funded under those agreements.

[26] Petitioners' reliance upon *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415 (D.C. Cir. 1997), *see* Pet. Br. at 34 n.16, is misplaced because *Miller*, by its terms, applies only to private sector unions, *see* 108 F.3d at 1423.

U.S. at 519. Respondent's opposition to Proposition 76 furthered the "government's vital policy interest in labor peace" because authorizing the Governor to abrogate labor agreements could lead to labor unrest among the state's workforce, for example, by state employees striking to protest unilateral cuts in their collectively-bargained wages and benefits. Indeed, simply conferring that authority on the Governor could lead to labor unrest since the *quid pro quo* for labor peace – the negotiation of agreements equally binding on both sides – would be undermined by such authority.

Moreover, as the Court explained in *Abood*, the government has a vital policy interest in insuring that all bargaining unit members pay their fair share of the costs of representational services from which they benefit. 431 U.S. at 221-22. Under California law, these representational services extend beyond negotiating at the bargaining table with the state employer (the Governor or the Governor's representative) to include lobbying the Legislature (or, in the case of an initiative, the electorate, which is the legislative decisionmaker in that context, *see California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1106 (9th Cir. 2003)). Indeed, under California law, such lobbying is not only within the statutory scope of Respondent's representation, but within the statutory scope of chargeable expenses. *See* Cal. Gov't Code §§3512, 3513(j), 3513(k), 3515.8, 3517, 3517.5; *Cumero*, 49 Cal. 3d at 597-98; *Lillebo v. Davis*, 222 Cal. App. 3d 1421, 1442 & n.12 (1990), *cert. denied*, 501 U.S. 1205 (1991); *see also Champion v. State of California*, 738 F.2d 1082, 1086 (9th Cir. 1984).[27] Because under California law Respondent represents the bargaining unit in such lobbying, and because all bargaining unit members share in the benefits of this representation, requiring them to contribute their fair share of the cost of this representation is "justified by the government's vital policy interest in labor peace and avoiding 'free riders.'" *Lehnert*, 500 U.S. at 519.[28]

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[27] This Court denied a petition for writ of certiorari in *Lillebo* only two weeks after issuing *Lehnert*. *Lillebo v. Davis*, 501 U.S. 1205 (1991).

Respondent's Proposition 76 expenditures satisfy the third element of the *Lehnert* test: whether charging for the activity at issue "significantly add[s] to the burdening of free speech that is inherent in the allowance of an agency or union shop." 500 U.S. at 519. Some nonmembers may have disagreed with Respondent's opposition to Proposition 76, just as certainly as some may disagree with positions it advances in collective bargaining negotiations. As the Court recognized in *Abood*, a nonmember "may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative." 431 U.S. at 222 (listing examples). *Abood* held, however, that such disagreements are inherent in the agency shop and do not permit a nonmember to "withdraw his financial support merely because he disagrees with the group's strategy." *Id.* at 223.

Respondent's opposition to Proposition 76 did not involve partisan politics or purely ideological issues with no relation to the bargaining unit, nor did it entail any public attribution of Respondent's opposition to Proposition 76 to the individual nonmembers. Charging nonmembers for Respondent's opposition to a proposition authorizing the Governor to abrogate their collective bargaining agreements does not "*significantly* add to the burdening of free speech that is inherent in the allowance of an agency or union shop," *Lehnert*, 500 U.S. at 519 (emphasis added), because in doing so the union is merely insuring that those agreements will be – and remain – implemented. That burden is no different from that inherent in allowing a union to charge nonmembers for lobbying to secure "ratification or implementation" (i.e., funding) of their collective bargaining agreements in the first place – a burden expressly approved by this Court in *Lehnert*, 500 U.S. at 520.

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[28] Because the California courts have conclusively determined that California law includes lobbying within the scope of union representation and permits public employee unions to charge nonmembers for such lobbying, Respondent's Proposition 76 expenditures are chargeable under the alternative test articulated by Justice Scalia in *Lehnert*. *See Lehnert*, 500 U.S. at 558 (Scalia, J.).

CONCLUSION

For the reasons discussed in Respondent's Motion to Dismiss, this case should be dismissed as moot. If it is not, the decision below should be affirmed.

Respectfully submitted,

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STATUTORY APPENDIX

The Ralph C. Dills Act

California Government Code §§3512-3524

3512. It is the purpose of this chapter to promote full communication between the state and its employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between the state and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the State of California by providing a uniform basis for recognizing the right of state employees to join organizations of their own choosing and be represented by those organizations in their employment relations with the state. It is further the purpose of this chapter, in order to foster peaceful employer-employee relations, to allow state employees to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to permit the exclusive representative to receive financial support from those employees who receive the benefits of this representation.

Nothing in this chapter shall be construed to contravene the spirit or intent of the merit principle in state employment, nor to limit the entitlements of state civil service employees, including those designated as managerial and confidential, provided by Article VII of the California Constitution or by laws or rules enacted pursuant thereto.

3513. As used in this chapter:

(a) "Employee organization" means any organization that includes employees of the state and that has as one of its primary purposes representing these employees in their relations with the state.

(b) "Recognized employee organization" means an employee organization that has been recognized by the state as the exclusive representative of the employees in an appropriate unit.

(c) "State employee" means any civil service employee of the state, and the teaching staff of schools under the jurisdiction of the State Department of Education or the Superintendent of Public Instruction, except managerial employees, confidential employees, supervisory employees, employees of the Department of Personnel Administration, professional employees of the Department of Finance engaged in technical or analytical state budget preparation other than the auditing staff, professional employees in the Personnel/Payroll Services Division of the Controller's office engaged in technical or analytical duties in support of the state's personnel and payroll systems other than the training staff, employees of the Legislative Counsel Bureau, employees of the Bureau of State Audits, employees of the office of the Inspector General, employees of the board, conciliators employed by the State Conciliation Service within the Department of Industrial Relations, employees of the Office of the State Chief Information Officer except as otherwise provided in Section 11546.5, and intermittent athletic inspectors who are employees of the State Athletic Commission.

(d) "Mediation" means effort by an impartial third party to assist in reconciling a dispute regarding wages, hours and other terms and conditions of employment between representatives of the public agency and the recognized employee organization or recognized employee organizations through interpretation, suggestion and advice.

(e) "Managerial employee" means any employee having significant responsibilities for formulating or administering agency or departmental policies and programs or administering an agency or department.

(f) "Confidential employee" means any employee who is required to develop or present management positions with respect to employer-employee relations or whose duties normally require access to confidential information contributing significantly to the development of management positions.

(g) "Supervisory employee" means any individual, regardless of the job description or title, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend this action, if, in connection with the foregoing, the exercise of this authority is not of a merely routine or clerical nature, but requires the use of independent judgment. Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.

(h) "Board" means the Public Employment Relations Board. The Educational Employment Relations Board established pursuant to Section 3541 shall be renamed the Public Employment Relations Board as provided in Section 3540. The powers and duties of the board described in Section 3541.3 shall also apply, as appropriate, to this chapter.

(i) "Maintenance of membership" means that all employees who voluntarily are, or who voluntarily become, members of a recognized employee organization shall remain members of that employee organization in good standing for a period as agreed to by the parties pursuant to a memorandum of understanding, commencing with the effective date of the memorandum of understanding. A maintenance of membership provision shall not apply to any employee who within 30 days prior to the expiration of the memorandum of understanding withdraws from the employee organization by sending a signed withdrawal letter to the employee organization and a copy to the Controller's office.

(j) "State employer," or "employer," for the purposes of bargaining or meeting and conferring in good faith, means the Governor or his or her designated representatives.

(k) "Fair share fee" means the fee deducted by the state employer from the salary or wages of a state employee in an appropriate unit who does not become a member of and financially support the recognized employee organization. The fair share fee shall be used to defray the costs incurred by the recognized employee organization in fulfilling its duty to represent the employees in their employment relations with the state, and shall not exceed the standard initiation fee, membership dues, and general assessments of the recognized employee organization.

3514. Any person who shall willfully resist, prevent, impede or interfere with any member of the board, or any of its agents, in the performance of duties pursuant to this chapter, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not more than one thousand dollars ($1,000).

3514.5. The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by the board and shall include all of the following:

(a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. The board shall have discretionary jurisdiction to review such settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits; otherwise, it shall dismiss the charge. The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

(b) The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

(c) The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

3515. Except as otherwise provided by the Legislature, state employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. State employees also shall have the right to refuse to join or participate in the activities of employee organizations, except that nothing shall preclude the parties from agreeing to a maintenance of membership provision, as defined in subdivision (i) of Section 3513, or a fair share fee provision, as defined in subdivision (k) of Section 3513, pursuant to a memorandum of understanding. In any event, state employees shall have the right to represent themselves individually in their employment relations with the state.

3515.5. Employee organizations shall have the right to represent their members in their employment relations with the state, except that once an employee organization is recognized as the exclusive representative of an appropriate unit, the recognized employee organization is the only organization that may represent that unit in employment relations with the state. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the state.

3515.6. All employee organizations shall have the right to have membership dues, initiation fees, membership benefit programs, and general assessments deducted pursuant to subdivision (a) of Section 1152 and Section 1153 until such time as an employee organization is recognized as the exclusive representative for employees in an appropriate unit, and then such deductions as to any employee in the negotiating unit shall not be permissible except to the exclusive representative.

3515.7.

(a) Once an employee organization is recognized as the exclusive representative of an appropriate unit it may enter into an agreement with the state employer providing for organizational security in the form of maintenance of membership or fair share fee deduction.

(b) The state employer shall furnish the recognized employee organization with sufficient employment data to allow the organization to calculate membership fees and the appropriate fair share fees, and shall deduct the amount specified by the recognized employee organization from the salary or wages of every employee for the membership fee or the fair share fee. These fees shall be remitted monthly to the recognized employee organization along with an adequate itemized record of the deductions, including, if required by the recognized employee organization, machine readable data. Fair share fee deductions shall continue until the effective date of a successor agreement or implementation of the state's last, best, and final offer, whichever occurs first. The Controller shall retain, from the fair share fee deduction, an amount equal to the cost of administering this section. The state employer shall not be liable in any action by a state employee seeking recovery of, or damages for, improper use or calculation of fair share fees.

(c) Notwithstanding subdivision (b), any employee who is a member of a religious body whose traditional tenets or teachings include objections to joining or financially supporting employee organizations shall not be required to financially support the recognized employee organization. That employee, in lieu of a membership fee or a fair share fee deduction, shall instruct the employer to deduct and pay sums equal to the fair share fee to a nonreligious, nonlabor organization, charitable fund approved by the California Victim Compensation and

Government Claims Board for receipt of charitable contributions by payroll deductions.

(d) A fair share fee provision in a memorandum of understanding that is in effect may be rescinded by a majority vote of all the employees in the unit covered by the memorandum of understanding, provided that: (1) a request for the vote is supported by a petition containing the signatures of at least 30 percent of the employees in the unit; (2) the vote is by secret ballot; and (3) the vote may be taken at any time during the term of the memorandum of understanding, but in no event shall there be more than one vote taken during the term. If the board determines that the appropriate number of signatures have been collected, it shall conduct the vote in a manner that it shall prescribe. Notwithstanding this subdivision, the state employer and the recognized employee organization may negotiate, and by mutual agreement provide for, an alternative procedure or procedures regarding a vote on a fair share fee provision.

(e) Every recognized employee organization that has agreed to a fair share fee provision shall keep an adequate itemized record of its financial transactions and shall make available annually, to the board and to the employees in the unit, within 90 days after the end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, certified as to accuracy by its president and treasurer or comparable officers. In the event of failure of compliance with this section, any employee in the unit may petition the board for an order compelling this compliance, or the board may issue a compliance order on its own motion.

(f) If an employee who holds conscientious objections pursuant to subdivision (c) requests individual representation in a grievance, arbitration, or administrative hearing from the recognized employee organization, the recognized employee organization is authorized to charge the employee for the reasonable cost of the representation.

(g) An employee who pays a fair share fee shall be entitled to fair and impartial representation by the recognized employee organization. A breach of this duty shall be deemed to have occurred if the employee organization's conduct in representation is arbitrary, discriminatory, or in bad faith.

3515.8. Any state employee who pays a fair share fee shall have the right to demand and receive from the recognized employee organization, under procedures established by the recognized employee organization, a return of any part of that fee paid by him or her which represents the employee's additional pro rata share of expenditures by the recognized employee organization that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment, or applied towards the cost of any other benefits available only to members of the recognized employee organization. The pro rata share subject to refund shall not reflect, however, the costs of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer. The board may compel the recognized employee organization to return that portion of a fair share fee which the board may determine to be subject to refund under the provisions of this section.

3516. The scope of representation shall be limited to wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

3516.5. Except in cases of emergency as provided in this section, the employer shall give reasonable written notice to each recognized employee organization affected by any law, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the employer, and shall give such recognized employee organizations the opportunity to meet and confer with the administrative officials or their delegated representatives as may be properly designated by law.

In cases of emergency when the employer determines that a law, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the administrative officials or their delegated representatives as may be properly designated by law shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following the adoption of such law, rule, resolution, or regulation.

3517. The Governor, or his representative as may be properly designated by law, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

"Meet and confer in good faith" means that the Governor or such representatives as the Governor may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the state of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses.

3517.5. If agreement is reached between the Governor and the recognized employee organization, they shall jointly prepare a written memorandum of such understanding which shall be presented, when appropriate, to the Legislature for determination.

3517.6.

(a) (1) In any case where the provisions of Section 70031 of the Education Code, or subdivision (i) of Section 3513, or Section 14876, 18714, 19080.5, 19100, 19143, 19261, 19818.16, 19819.1, 19820, 19822, 19824, 19826, 19827, 19828, 19829, 19830, 19831, 19832, 19833, 19834, 19835, 19836, 19837, 19838, 19839, 19840, 19841, 19842, 19843, 19844, 19845, 19846, 19847, 19848, 19849, 19849.1, 19849.4, 19850.1, 19850.2, 19850.3, 19850.4, 19850.5, 19850.6, 19851, 19853, 19854, 19856, 19856.1, 19858.1, 19858.2, 19859, 19860, 19861, 19862, 19862.1, 19863, 19863.1, 19864, 19866, 19869, 19870, 19871, 19871.1, 19872, 19873, 19874, 19875, 19876, 19877, 19877.1, 19878, 19879, 19880, 19880.1, 19881, 19882, 19883, 19884, 19885, 19887, 19887.1, 19887.2, 19888, 19990, 19991, 19991.1, 19991.2, 19991.3, 19991.4, 19991.5, 19991.6, 19991.7, 19992, 19992.1, 19992.2, 19992.3, 19992.4, 19993, 19994.1, 19994.2, 19994.3, 19994.4, 19995, 19995.1, 19995.2, 19995.3, 19996.1, 19996.2, 19998, 19998.1, 20796, 21600, 21602, 21604, 21605, 22870, 22871, or 22890 are in conflict with the provisions of a memorandum of understanding, the memorandum of understanding shall be controlling without further legislative action.

(2) Notwithstanding paragraph (1), this paragraph shall apply only to state employees in State Bargaining Unit 5. In any case where the provisions of Section 70031 of the Education Code, or subdivision (i) of Section 3513, or Section 14876, 18714, 19080.5, 19100, 19143, 19261, 19576.1, 19818.16, 19819.1, 19820, 19822, 19824, 19826, 19827, 19828, 19829, 19830, 19831, 19832, 19833, 19834, 19835, 19836, 19837, 19838, 19839, 19840, 19841, 19842, 19843, 19844, 19845, 19846, 19847, 19848, 19849, 19849.1, 19849.4, 19850.1, 19850.2, 19850.3, 19850.4, 19850.5, 19850.6, 19851, 19853, 19854, 19856, 19856.1, 19858.1, 19858.2, 19859, 19860, 19861, 19862, 19862.1, 19863, 19863.1, 19864, 19866, 19869, 19870, 19871, 19871.1, 19872, 19873, 19874, 19875, 19876, 19877, 19877.1, 19878, 19879, 19880, 19880.1, 19881, 19882, 19883, 19884, 19885, 19887, 19887.1, 19887.2, 19888, 19990, 19991, 19991.1, 19991.2, 19991.3, 19991.4, 19991.5, 19991.6, 19991.7, 19992, 19992.1, 19992.2, 19992.3, 19992.4, 19993, 19994.1, 19994.2, 19994.3, 19994.4, 19995, 19995.1, 19995.2, 19995.3, 19996.1, 19996.2, 19998, 19998.1, 20796, 21600, 21602, 21604, 21605, 22870, 22871, or 22890 are in conflict with the provisions of a memorandum of understanding, the memorandum of understanding shall be controlling without further legislative action.

(3) Notwithstanding paragraph (1), this paragraph shall apply only to state employees in State Bargaining Unit 8. In any case where the provisions of Section 70031 of the Education Code, or subdivision (i) of Section 3513, or Section 14876, 18714, 19080.5, 19100, 19143, 19261, 19574, 19574.1, 19574.2, 19575, 19576.1, 19578, 19582, 19582.1, 19175.1, 19818.16, 19819.1, 19820, 19822, 19824, 19826, 19827, 19828, 19829, 19830, 19831, 19832, 19833, 19834, 19835, 19836, 19837, 19838, 19839, 19840, 19841, 19842, 19843, 19844, 19845, 19846, 19847, 19848, 19849, 19849.1, 19849.4, 19850.1, 19850.2, 19850.3, 19850.4, 19850.5, 19850.6, 19851, 19853, 19854, 19856, 19856.1, 19858.1,

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(4) Notwithstanding paragraph (1), this paragraph shall apply only to state employees in State Bargaining Unit 12 or 13. In any case where the provisions of Section 70031 of the Education Code, or subdivision (i) of Section 3513, or Section 14876, 18670, 18714, 19080.5, 19100, 19143, 19261, 19574, 19574.1, 19574.2, 19575, 19578, 19582, 19583, 19702, 19818.16, 19819.1, 19820, 19822, 19824, 19826, 19827, 19828, 19829, 19830, 19831, 19832, 19833, 19834, 19835, 19836, 19837, 19838, 19839, 19840, 19841, 19842, 19843, 19844, 19845, 19846, 19847, 19848, 19849, 19849.1, 19849.4, 19850.1, 19850.2, 19850.3, 19850.4, 19850.5, 19850.6, 19851, 19853, 19854, 19856, 19856.1, 19858.1, 19858.2, 19859, 19860, 19861, 19862, 19862.1, 19863, 19863.1, 19864, 19866, 19869, 19870, 19871, 19871.1, 19872, 19873, 19874, 19875, 19876, 19877, 19877.1, 19878, 19879, 19880, 19880.1, 19881, 19882, 19883, 19884, 19885, 19887, 19887.1, 19887.2, 19888, 19990, 19991, 19991.1, 19991.2, 19991.3, 19991.4, 19991.5, 19991.6, 19991.7, 19992, 19992.1, 19992.2, 19992.3, 19992.4, 19993, 19994.1, 19994.2, 19994.3, 19994.4, 19995, 19995.1, 19995.2, 19995.3, 19996.1, 19996.2, 19998, 19998.1, 20796, 21600, 21602, 21604, 21605, 22870, 22871, or 22890 are in conflict with the provisions of a memorandum of understanding,

the memorandum of understanding shall be controlling without further legislative action.

(b) In any case where the provisions of Section 19997.2, 19997.3, 19997.8, 19997.9, 19997.10, 19997.11, 19997.12, 19997.13, or 19997.14 are in conflict with the provisions of a memorandum of understanding, the terms of the memorandum of understanding shall be controlling unless the State Personnel Board finds those terms to be inconsistent with merit employment principles as provided for by Article VII of the California Constitution. Where this finding is made, the provisions of the Government Code shall prevail until those affected sections of the memorandum of understanding are renegotiated to resolve the inconsistency. If any provision of the memorandum of understanding requires the expenditure of funds, those provisions of the memorandum of understanding may not become effective unless approved by the Legislature in the annual Budget Act. If any provision of the memorandum of understanding requires legislative action to permit its implementation by amendment of any section not cited above, those provisions of the memorandum of understanding may not become effective unless approved by the Legislature.

3517.61. Notwithstanding Section 3517.6, for state employees in State Bargaining Unit 6, in any case where the provisions of Section 70031 of the Education Code, subdivision (i) of Section 3513, or Section 14876, 18714, 19080.5, 19100, 19143, 19261, 19818.16, 19819.1, 19820, 19822, 19824, 19826, 19827, 19828, 19829, 19830, 19831, 19832, 19833, 19834, 19835, 19836, 19837, 19838, 19839, 19840, 19841, 19842, 19843, 19844, 19845, 19846, 19847, 19848, 19849, 19849.1, 19849.4, 19850.1, 19850.2, 19850.3, 19850.4, 19850.5, 19850.6, 19851, 19853, 19854, 19856, 19856.1, 19858.1, 19858.2, 19859, 19860, 19861, 19862, 19862.1, 19863, 19863.1, 19864, 19866, 19869, 19870, 19871, 19871.1, 19872, 19873, 19874, 19875, 19876, 19877, 19877.1, 19878, 19879, 19880, 19880.1, 19881, 19882, 19883, 19884, 19885, 19887, 19887.1, 19887.2, 19888, 19990, 19991, 19991.1, 19991.2, 19991.3, 19991.4, 19991.5, 19991.6, 19991.7, 19992, 19992.1, 19992.2, 19992.3, 19992.4, 19993, 19994.1, 19994.2, 19994.3, 19994.4 19995, 19995.1, 19995.2, 19995.3, 19996.1, 19996.2, 19998, 19998.1, 20796, 21600, 21602, 21604, 21605, 22870, 22871, or 22890 are in conflict with the provisions of a memorandum of understanding, the memorandum of understanding shall be controlling without further legislative action. In any case where the provisions of Section 19997.2, 19997.3, 19997.8, 19997.9, 19997.10, 19997.11, 19997.12, 19997.13, or 19997.14 are in conflict with the provisions of a memorandum of understanding, the terms of the memorandum of understanding shall be controlling unless the State Personnel Board finds those terms to be inconsistent with merit employment principles as provided for by Article VII of the California Constitution. Where this finding is made, the provisions of the Government Code shall prevail until those affected sections of the memorandum of understanding are renegotiated to resolve the inconsistency. If any provision of the memorandum of understanding requires the expenditure of funds, those provisions of the memorandum of understanding may not become effective unless approved by the Legislature in the annual Budget Act. If any provision of the memorandum of understanding requires legislative action to permit its implementation by amendment of any section not cited above, those provisions of the memorandum of understanding may not become effective unless approved by the Legislature.

3517.63.

(a) Any side letter, appendix, or other addendum to a properly ratified memorandum of understanding that requires the expenditure of two hundred fifty thousand dollars ($250,000) or more related to salary and benefits and that is not already contained in the original memorandum of understanding or the Budget Act, shall be provided by the Department of Personnel Administration to the Joint Legislative Budget Committee. The Joint Legislative Budget Committee shall determine within 30 days after receiving the side letter, appendix, or other addendum if it presents substantial additions that are not reasonably within the parameters of the original memorandum of understanding and thereby requires legislative action to ratify the side letter, appendix, or other addendum.

(b) A side letter, appendix, or other addendum to a properly ratified memorandum of understanding that does not require the expenditure of funds shall be expressly identified by the Department of Personnel Administration if that side letter, appendix, or other addendum is to be incorporated in a subsequent memorandum of understanding submitted to the Legislature for approval.

3517.7. If the Legislature does not approve or fully fund any provision of the memorandum of understanding which requires the expenditure of funds, either party may reopen negotiations on all or part of the memorandum of understanding.

Nothing herein shall prevent the parties from agreeing and effecting those provisions of the memorandum of understanding which have received legislative approval or those provisions which do not require legislative action.

3517.8.

(a) If a memorandum of understanding has expired, and the Governor and the recognized employee organization have not agreed to a new memorandum of understanding and have not reached an impasse in negotiations, subject to subdivision (b), the parties to the agreement shall continue to give effect to the provisions of the expired memorandum of understanding, including, but not limited to, all provisions that supersede existing law, any arbitration provisions, any no strike provisions, any agreements regarding matters covered in the Fair Labor Standards Act of 1938 (29 U.S.C. Sec. 201 et seq.), and any provisions covering fair share fee deduction consistent with Section 3515.7.

(b) If the Governor and the recognized employee organization reach an impasse in negotiations for a new memorandum of understanding, the state employer may implement any or all of its last, best, and final offer. Any proposal in the state employer's last, best, and final offer that, if implemented, would conflict with existing statutes or require the expenditure of funds shall be presented to the Legislature for approval and, if approved, shall be controlling without further legislative action, notwithstanding Sections 3517.5, 3517.6, and 3517.7. Implementation of the last, best, and final offer does not relieve the parties of the obligation to bargain in good faith and reach an agreement on a memorandum of understanding if circumstances change, and does not waive rights that the recognized employee organization has under this chapter.

3518. If after a reasonable period of time, the Governor and the recognized employee organization fail to reach agreement, the Governor and the recognized employee organization may agree upon the appointment of a mediator mutually agreeable to the parties, or either party may request the board to appoint a mediator. When both parties mutually agree upon a mediator, costs of mediation shall be divided one-half to the state and one-half to the recognized employee organization. If the board appoints the mediator, the costs of mediation shall be paid by the board.

3518.5. A reasonable number of employee representatives of recognized employee organizations shall be granted reasonable time off without loss of compensation or other benefits when formally meeting and conferring with representatives of the state on matters within the scope of representation.

This section shall apply only to state employees, as defined by subdivision (c) of Section 3513, and only for periods when a memorandum of understanding is not in effect.

3518.7. Managerial employees and confidential employees shall be prohibited from holding elective office in an employee organization which also represents "state employees," as defined in subdivision (c) of Section 3513.

3519. It shall be unlawful for the state to do any of the following:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and confer in good faith with a recognized employee organization.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

(e) Refuse to participate in good faith in the mediation procedure set forth in Section 3518.

3519.5. It shall be unlawful for an employee organization to:

(a) Cause or attempt to cause the state to violate Section 3519.

(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(c) Refuse or fail to meet and confer in good faith with a state agency employer of any of the employees of which it is the recognized employee organization.

(d) Refuse to participate in good faith in the mediation procedure set forth in Section 3518.

3520.

(a) Judicial review of a unit determination shall only be allowed: (1) when the board, in response to a petition from the state or an employee organization, agrees that the case is one of special importance and joins in the request for such review; or (2) when the issue is raised as a defense to an unfair practice complaint. A board order directing an election shall not be stayed pending judicial review.

Upon receipt of a board order joining in the request for judicial review, a party to the case may petition for a writ of extraordinary relief from the unit determination decision or order.

(b) Any charging party, respondent, or intervenor aggrieved by a final decision or order of the board in an unfair practice case, except a decision of the board not to issue a complaint in such a case, may petition for a writ of extraordinary relief from such decision or order.

(c) Such petition shall be filed in the district court of appeal in the appellate district where the unit determination or unfair practice dispute occurred. The petition shall be filed within 30 days after issuance of the board's final order, order denying reconsideration, or order joining in the request for judicial review, as applicable. Upon the filing of such petition, the court shall cause notice to be served upon the board and thereupon shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board, within 10 days after the clerk's notice unless such time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board such temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying, or setting aside the order of the board. The findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The provisions of Title 1 (commencing with Section 1067) of Part 3 of the Code of Civil Procedure relating to writs shall, except where specifically superseded herein, apply to proceedings pursuant to this section.

(d) If the time to petition for extraordinary relief from a board decision has expired, the board may seek enforcement of any final decision or order in a district court of appeal or a superior court in the district where the unit determination or unfair practice case occurred. If, after hearing, the court determines that the order was issued pursuant to procedures established by the board and that the person or entity refuses to comply with the order, the court shall enforce such order by writ of mandamus. The court shall not review the merits of the order.

3520.5.

(a) The state shall grant exclusive recognition to employee organizations designated or selected pursuant to rules established by the board for employees of the state or an appropriate unit thereof, subject to the right of an employee to represent himself.

(b) The board shall establish reasonable procedures for petitions and for holding elections and determining appropriate units pursuant to subdivision (a).

(c) The board shall also establish procedures whereby recognition of employee organizations formally recognized as exclusive representatives pursuant to a vote of the employees may be revoked by a majority vote of the employees only after a period of not less than 12 months following the date of such recognition.

3520.7. The state employer shall adopt reasonable rules and regulations for all of the following:

(a) Registering employee organizations, as defined by subdivision (c) of Section 1150, and bona fide associations, as defined by subdivision (d) of Section 1150.

(b) Determining the status of organizations and associations as employee organizations or bona fide associations.

(c) Identifying the officers and representatives who officially represent employee organizations and bona fide associations.

3521.

(a) In determining an appropriate unit, the board shall be governed by the criteria in subdivision (b). However, the board shall not direct an election in a unit unless one or more of the employee organizations involved in the proceeding is seeking or agrees to an election in such a unit.

(b) In determining an appropriate unit, the board shall take into consideration all of the following criteria:

(1) The internal and occupational community of interest among the employees, *including, but not limited to*, the extent to which they perform functionally related services or work toward established common goals; the history of employee representation in state government and in similar employment; the extent to which the employees have common skills, working conditions, job duties, or similar educational or training requirements; and the extent to which the employees have common supervision.

(2) The effect that the projected unit will have on the meet and confer relationships, emphasizing the availability and authority of employer representatives to deal effectively with employee organizations representing the unit, and taking into account such factors as work location, the numerical size of the unit, the relationship of the unit to organizational patterns of the state government, and the effect on the existing classification structure or existing classification schematic of dividing a single class or single classification schematic among two or more units.

(3) The effect of the proposed unit on efficient operations of the employer and the compatibility of the unit with the responsibility of state government and its employees to serve the public.

(4) The number of employees and classifications in a proposed unit and its effect on the operations of the employer, on the objectives of providing the employees the right to effective representation, and on the meet and confer relationship.

(5) The impact on the meet and confer relationship created by fragmentation of employees or any proliferation of units among the employees of the employer.

(6) Notwithstanding the foregoing provisions of this section, or any other provision of law, an appropriate group of skilled crafts employees shall have the right to be a separate unit of representation based upon occupation. Skilled crafts employees shall include, but not necessarily be limited to, employment categories such as carpenters, plumbers, electricians, painters, and operating engineers.

(c) There shall be a presumption that professional employees and nonprofessional employees should not be included in the same unit. However, the presumption shall be rebuttable, depending upon what the evidence pertinent to the citeria set forth in subdivision (b) establishes.

3521.5. The term "professional employee" means (a) any employee engaged in work (1) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (2) involving the consistent exercise of discretion and judgment in its performance; (3) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (4) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or (b) any employee, who (1) has completed the courses of specialized intellectual instruction and study described in paragraph 4 of subdivision (a), and (2) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in subdivision (a).

3521.7. The board may, in accordance with reasonable standards, designate positions or classes of positions which have duties consisting primarily of the enforcement of state laws. Employees so designated shall not be denied the right to be in a unit composed solely of such employees.

3522.

(a) Physicians in any state bargaining unit may negotiate under this chapter for preauthorized travel outside the state for continuing medical education.

(b) The execution of a memorandum of understanding entered into pursuant to subdivision (a) shall constitute the approvals required under Sections 11032 and 11033, except that if the provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

3523.

(a) All initial meet and confer proposals of recognized employee organizations shall be presented to the employer at a public meeting, and such proposals thereafter shall be a public record.

All initial meet and confer proposals or counterproposals of the employer shall be presented to the recognized employee organization at a public meeting, and such proposals or counterproposals thereafter shall be a public record.

(b) Except in cases of emergency as provided in subdivision (d), no meeting and conferring shall take place on any proposal subject to subdivision (a) until not less than seven consecutive days have elapsed to enable the public to become informed, and to publicly express itself regarding the proposals, as well as regarding other possible subjects of meeting and conferring and thereafter, the employer shall, in open meeting, hear public comment on all matters related to the meet and confer proposals.

(c) Forty-eight hours after any proposal which includes any substantive subject which has not first been presented as proposals for public reaction pursuant to this section is offered during any meeting and conferring session, such proposals and the position, if any, taken thereon by the representatives of the employer, shall be a public record.

(d) Subdivision (b) shall not apply when the employer determines that, due to an act of God, natural disaster, or other emergency or calamity affecting the state, and which is beyond the control of the employer or recognized employee organization, it must meet and confer and take action upon such a proposal immediately and without sufficient time for the public to become informed and to publicly express itself. In such cases the results of such meeting and conferring shall be made public as soon as reasonably possible.

3523.5. The enactment of this chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to state employees.

3524. This chapter shall be known and may be cited as the Ralph C. Dills Act.

REPLY
BRIEF

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No. 10-1121

IN THE
Supreme Court of the United States

DIANNE KNOX; WILLIAM L. BLAYLOCK;
ROBERT A. CONOVER; EDWARD L. DOBROWOLSKI, JR.;
KARYN GIL; THOMAS JACOB HASS; PATRICK JOHNSON;
AND JON JUMPER, ON BEHALF OF THEMSELVES
AND THE CLASSES THEY REPRESENT,
Petitioners,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 1000,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

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PETITIONERS' REPLY BRIEF ON THE MERITS

INTRODUCTION

Petitioners' opening Brief discussed the *reduction ad absurdum* of Respondent SEIU's theory of the case: a union could impose a massive mid-year assessment expressly designed to support a presidential candidate; could collect that assessment from nonmembers; and could spend every penny to support the candidate—all without offering nonmembers any mechanism to avoid the exaction. Rather than disagreeing, SEIU concedes that this is exactly what its approach means. SEIU's Br. 19 n.9. But not to worry, it assures the Court; that is acceptable because money is "fungible" and in the long run it all comes out in the wash. *Id.* at 21-25.

SEIU is dead wrong. This Court's forced-unionism cases are unambiguous: nonmembers cannot be forced, "'*even temporarily*, to finance ideological activities unrelated to collective bargaining.'" *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 305 (1986) (emphasis added) (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 244 (1977) (Stevens, J., concurring)). That is so because "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.'" *Abood*, 431 U.S. at 235 n.31 (quoting I. Brant, *James Madison: The Nationalist* 354 (1948)). SEIU practices what these authorities forbid. The Court should reject SEIU's novel approach, and adopt the approach set forth in Petitioners' opening Brief, and endorsed by the District Court.

In particular, this Court should apply strict scrutiny to determine what safeguards are required to protect nonmembers' First Amendment rights. The Court applies strict scrutiny in compelled-association cases, and it repeatedly has held that compelled union dues constitute compelled association—which no doubt explains why *Hudson* required "careful[ ] tailor[ing]" and cited numerous strict-scrutiny cases to support its conclusion. 475 U.S. at 303 & n.11.

SEIU resists this approach, but to do so it must distort the law, arguing that compelled-dues cases do not implicate associational freedoms. SEIU's Br. 34-35. This Court has squarely held that they do. *E.g.*, *Abood*, 431 U.S. at 234. SEIU also argues that strict scrutiny is inappropriate in cases involving "procedural First Amendment rights," SEIU's Br. 38-39, but that argument manufactures a distinction where none exists. It should be rejected.

Applying a high degree of scrutiny, this Court should adopt the rule set forth in the opening Brief: "When a union increases the amount . . . it collects from nonmembers between its annual *Hudson* notices," it "(1) cannot collect the increase from those nonmembers who have already objected; and (2) must not collect the increase from other nonmembers until it has ascertained their wishes by providing them with a new notice and opportunity to object." Pet. Br. 11. This bright-line rule is appropriate because, when a union increases its exactions mid-year, the only way to ensure the additional monies extracted from objecting nonmembers will not be spent on ideological causes is to bar collection of the assessment from them. That safeguards associational freedoms and would have minimal impact on unions' collective-bargaining resources.

At a minimum, this Court should recognize why SEIU is obviously wrong: when a union imposes a special assessment with the *stated intent* of spending it on political advocacy,[1] it cannot collect that assessment from objecting nonmembers. Anything less would topple *Hudson*'s "careful[ ] tailor[ing]" requirement.

On the second Question Presented, SEIU studiously downplays the merits and argues that the issue is not properly before the Court. SEIU is incorrect. The

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[1] This is such a case, despite SEIU's attempt to muddy the facts. SEIU made quite clear that it would spend the special assessment on political advocacy, and *only* political advocacy. *See infra* at 12-13.

Nonmembers raised chargeability in their Complaint, and the Ninth Circuit opined on the issue. Indeed, it could not have avoided doing so: chargeability is inextricably intertwined with the *Hudson* analysis because the special assessment's obvious non-chargeability is what made the *Hudson* violation so egregious, and it is a necessary part of the remedy. This Court should reach that question and reverse, reaffirming that objecting nonmembers cannot be compelled to fund union political spending unless it is tied directly to "ratification or implementation of a dissenter's collective-bargaining agreement." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520 (1991).

ARGUMENT

I. STRICT SCRUTINY APPLIES TO FORCED-UNIONISM CASES.

Disregarding decades of First Amendment precedent, SEIU urges that nonmembers' rights to be free from coerced participation in union speech and association are attenuated and not protected by strict scrutiny. SEIU's Br. 31-42. That is incorrect. This is a compelled-association case, and it should be treated like any other compelled-association case. That is how the Court has approached forced-unionism cases in the past; it should reaffirm that approach here.

A. Strict Scrutiny Applies Here, as in Any Other Compelled-Association Case.

Strict scrutiny applies here for a simple reason: This is a compelled-association case. *Abood* explained that "the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments" and that the fact that nonmembers "are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights." 431 U.S. at 233-234. Citing that portion of *Abood*, the Court reiterated in *Roberts v. U.S. Jaycees* that "[f]reedom of association . . . plainly presupposes a freedom not to associate." 468 U.S. 609, 623 (1984). And *Roberts* squarely held that the right not to associate—a right it relied upon *Abood* to define—is protected by strict scrutiny. *Id.* Lest there be any doubt, *Hudson* explained that "careful[ ] tailor[ing]" is required to protect nonmembers' rights, and for that proposition cited *Roberts* and *quoted its strict scrutiny language in full*. 475 U.S. at 303 & n.11. Finally, in *Lehnert*, nine Justices recognized that a "vital" or "compelling" government interest is required to justify charging nonmembers for any particular union activity. *See* 500 U.S. at 519 (majority opinion); *id.* at 556-57 (Scalia, J., joined by Kennedy, Souter, and O'Connor, J.J., concurring in part).

The conclusion is inescapable: union exactions from nonmembers must satisfy strict scrutiny. That test may be satisfied when it is clear that exactions are used solely to support collective bargaining activities; then the Court has seen an important governmental interest in "labor peace," *Abood*, 431 U.S. at 224, when the collection is narrowly tailored. It is not satisfied, however, where—as here—the union adopts procedures that allow exactions from nonmembers to flow directly to ideological causes. Obviously, there are "means significantly less restrictive of associational freedoms," *Roberts*, 468 U.S. at 623, that SEIU could adopt that would still allow it to fully fund its collective-bargaining activities.

B. SEIU's Contrary Arguments Are Meritless.

SEIU offers three contrary arguments. None has merit.

1. SEIU asserts that *Hudson* addresses "procedural First Amendment rights," and that such "*procedural* rights" are generally subject to a lesser degree of constitutional scrutiny than "substantive" First Amendment rights. SEIU's Br. 8, 32, 38-42. This distinction defies this Court's cases. *See Washington v. Harper*, 494 U.S. 210, 220 (1990) ("procedural protections must be examined in terms of the substantive rights at stake"); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 309 (1986) (rejecting argument that prior decisions established a "two-tiered system of constitutional rights, with substantive rights afforded greater protection than 'mere' procedural safeguards"). It also defies logic. No clean line can be drawn between procedure and substance here. They are inextricably intertwined; the right to avoid compelled association is the substantive right, and the need for careful tailoring to protect that right undergirds the procedure requiring a "*Hudson* notice." There is no separate "procedural First Amendment right" at issue.

Nor do this Court's cases suggest the contrary. SEIU relies heavily on Justice O'Connor's plurality opinion in *Waters* v. *Churchill*, 511 U.S. 661 (1994). That opinion, which did not command five votes, addressed a completely different subject. *Waters* concerned procedures required "in proceedings that may penalize protected speech," *id.* at 669, an issue bearing no relationship to what might constitute narrow tailoring in a compelled-association case. Indeed, Justice Scalia concurred, joined by Justices

Kennedy and Thomas, emphasizing how "circumspect" the Court has been "about acknowledging procedural components of the First Amendment" and collecting the prior examples of which he was aware. *Id.* at 686-87 (Scalia, J., concurring in judgment). "Almost all" involved constitutional "limitation[s] on defamation suits." *Id.* Forced-unionism cases were not mentioned. Significantly, Justice Scalia's concurrence marks the only appearance of the phrase "procedural First Amendment rights" in this Court's decisions. *Id.* at 689. SEIU, in short, draws an analytical distinction where none exists.[2]

2. SEIU next argues that forced union fees are "constitutionally distinct from 'compelled speech'" and that they have "no effect on non-members' ability to express messages of their own choosing, or to express no message if they prefer." SEIU's Br. 35-36. That is a bold argument given that this Court has squarely and repeatedly held the contrary. *Abood* held that "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests" and "*impinge[s] upon associational freedom.*" 431 U.S. at 222, 225 (emphasis added). The Court accepted the nonmembers' argument that they "fall within the

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[2] Nor does this case bear any relationship to cases like *Pickering v. Board of Education*, 391 U.S. 563 (1968). *See* SEIU's Br. 40-41. *Pickering* and its progeny imposed a balancing test so that courts could respect the need for a trade-off between an employee's First Amendment rights and a government employer's obligation to supervise and control its employees. *See Pickering*, 391 U.S. at 568. Here, the Nonmembers do not work for SEIU, nor is SEIU a governmental employer. The state interest leading to a balancing test in the public employee speech cases—the government employer's "interest[ ] as an employer in regulating the speech of its employees," *id.*—is completely absent.

protection" of the freedom-of-association cases "because they have been prohibited, not from actively associating, but rather from refusing to associate." *Id.* at 234. And *Ellis* v. *Railway Clerks* reiterated that the union shop "countenance[s] a significant impingement on First Amendment rights" because "[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree." 466 U.S. 435, 455 (1984). The infringement is particularly acute in the public sector, where the state compels individuals to support the union as their "exclusive representative" to petition the state over certain matters. SEIU's Br. App. 1a-10a; CAL. GOV'T CODE §§ 3513(a), (b), & (k), 3515.5, 3515.7 & 3516. *Abood* and *Ellis* foreclose SEIU's argument that this is not a case of compelled expressive association.

SEIU cites several cases for the contrary proposition. SEIU's Br. 35. But the language SEIU quotes cannot trump this Court's square holdings that compelled-fee cases are about compelled association, *see supra* at 4-5. The cited cases also do not help SEIU.

Rumsfeld v. *FAIR* addressed a law primarily regulating *conduct*; the Court distinguished situations where "the complaining speaker's own message was affected by the speech it was forced to accommodate." 547 U.S. 47, 63 (2006). "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. Nat'l Fed'n of the Blind,* 487 U.S. 781, 795 (1988).

As for *Johanns v. Livestock Marketing Ass'n,* 544 U.S. 550 (2005), and *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), both cited *Abood* as a situation of compelled expressive association. *Johanns*, 544 U.S. at 558; *Glickman*, 521 U.S. at 471. Moreover, *Johanns* concerned government speech, 544 U.S. at 560-61, and *Glickman* involved compelled economic association, which this Court specifically *distinguished* from its union-fee decisions. 521 U.S. at 470 n.14.

3. SEIU next argues that the compelled-fee cases must be read to reject application of strict scrutiny. SEIU's Br. 31-34. But *Abood* and *Hudson* both are best read to apply strict scrutiny, as discussed *supra* at 4-5, and SEIU's contrary contentions are demonstrably incorrect.

First, SEIU claims that under *Abood* and its progeny, "expenditures for core collective-bargaining activities are not subject to *any* constitutional scrutiny." *Id.* at 32 n.15. That is simply not so. *Abood* explained that the "impingement upon associational freedom created by the agency shop" is justified by the "important government interests" in "labor peace" and avoiding "free riders." 431 U.S. at 224-25. Later cases reinforced the point, explaining that the "interference with First Amendment rights" created by forced fees is "justified by the governmental interest in industrial peace." *Ellis*, 466 U.S. at 455-56; *accord Hudson*, 475 U.S. at 309 ("the agency shop itself impinges on the nonunion employees' First Amendment interests"). These holdings foreclose the argument that *some* compulsory union fees are not subject to scrutiny. All are. And while they survive that scrutiny when "carefully tailored" to ensure that objecting nonmembers are not forced to contribute to ideological activities, *Hudson*, 475 U.S. at 303, they fail when not so tailored. That is an application of "constitutional scrutiny," SEIU's Br. 32 n.15, under any definition.

Second, SEIU unconvincingly deems *Hudson*'s citation of numerous strict-scrutiny cases irrelevant because "*Hudson* nowhere stated that, by citing substantive First Amendment cases, it intended to invoke strict scrutiny." *Id.* at 33 n.17. This Court did not invoke strict scrutiny cases accidentally. Quite the contrary, reliance on them flowed naturally from *Abood* and *Roberts*, which recognized that compelled-fee cases involve compelled association and that the constitutionality of compelled association is measured using strict scrutiny. *See supra* at 4-5.

Third, SEIU asserts that *Hudson* cannot be a strict-scrutiny case because it rejected several requirements that would have been consistent with a least-restrictive-means test and exhibited "deference to legislative judgments" inconsistent with strict scrutiny. SEIU's Br. 33-34. Not so. *Hudson* mandated a procedure, on the facts there presented, to prevent *any* of an objecting nonmember's fees from being used for nonchargeable activities. That procedure and outcome is consistent with strict scrutiny, which is why the Court relied on previous strict-scrutiny cases. And *Hudson*'s supposed "deference to legislative judgments," *id.*, was merely an identification of governmental interest in promoting "labor peace" and avoiding "free riders" that the Court has long recognized as compelling. 475 U.S. at 301 n.8.

Fourth, this case does not address "the 'enhancement' of a group's speech through a viewpoint-neutral state regulation," SEIU's Br. 37-38 (as SEIU inaccurately casts forced-unionism statutes), a government decision to "subsidize the political activities of some organizations but not others," *id.* at 38, or the responsive enhancement of a group's speech with *state* money as in *Arizona Free Enterprise Club's Freedom Club PAC* *v. Bennett*, 131 S. Ct. 2806, 2822 (2011).[3] *See* SEIU's Br. 37-38. This case involves an entirely different question: The union's attempt "to acquire and spend *other people's* money," *Davenport v. Washington Education Ass'n*, 551 U.S. 177, 187 (2007), on a political cause they do not support. That is subject to strict scrutiny.

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SEIU's fundamental theme is that strict scrutiny is inapplicable because (i) the fees extracted from the Nonmembers only supported collective bargaining activities and (ii) extractions to support those activities are of no constitutional concern. SEIU's factual premise is incorrect, as we discuss below. Moreover, SEIU conceptually misunderstands how the First Amendment applies in these cases. The cases beginning with *Abood* make clear that *any* forced association triggers exacting scrutiny. The only difference between chargeable and non-chargeable activities is that the Court found that a compelling state interest justifies compelled support of the former, but not the latter. That is why agency-shop procedures must be narrowly tailored to ensure that nonmembers are not forced to contribute to non-chargeable political activities. There was no such tailoring here, as we next explain.

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[3] *Regan v. Taxation With Representation* distinguishes cases in which Congress has subsidized private speech "out of public monies" from those in which an ordinance "regulated First Amendment activity by limiting individuals' expenditures out of their own money on political speech." 461 U.S. 540, 545, 546 n.7 (1983).

II. SEIU'S PROCEDURE CANNOT BE SQUARED WITH *HUDSON* BECAUSE IT ALLOWS THE VERY EVILS *HUDSON* SOUGHT TO PREVENT.

SEIU spills much ink explaining why its special assessment for a "Political Fight-Back Fund" conformed with *Hudson*. SEIU's Br. 9-31. Its arguments miss the forest for the trees. The heart of the matter is this: *Hudson* and its progenitors squarely "prohibit[ ]" compelled contributions for "ideological activities unrelated to collective bargaining," *Abood*, 431 U.S. at 236, yet SEIU's "Political Fight-Back Fund" was a compelled contribution for ideological activities unrelated to collective bargaining. The case is no different than if union officials had approached nonmembers and demanded $20 to support a particular candidate for public office. That is impermissible, regardless of the fungibility of money and whether SEIU's total chargeable percentage for 2005 ended up higher or lower than the year before. SEIU's attempt to elevate *Hudson*'s facts above its logic should be rejected.

1. SEIU relies heavily on the observation in *Hudson* that "'absolute precision' in the calculation of the charge . . . cannot be 'expected or required,'" and that accordingly unions can, in the normal course, calculate the compelled fee based on "'expenses during the preceding year.'" SEIU's Br. 12 (quoting *Hudson*, 475 U.S. at 307 n.18). Those principles justify SEIU's course here, it says, because SEIU's overall chargeable spending percentage increased during 2005-06, such that objecting nonmembers "in fact paid *less* than their proportionate share of . . . chargeable expenses during the relevant time period." SEIU's Br. 15. SEIU thus asserts that the "theoretical possibility"

that a union could comply with *Hudson*'s requirements and "nonetheless compel nonmembers to subsidize its political activities through an 'involuntary loan' is not presented by the facts of this case." *Id.* at 10.

We pause to emphasize just how far this argument strays from common sense. This case involves a "Political Fight-Back Fund" imposed to "defeat Propositions 76 and 75," "elect a governor and legislature who support public employees," and fund "a broad range of political expenses, including television and radio advertising" and "get out the vote activities." Pet. App. A 6a, 28a. SEIU enacted a special assessment and collected it from the Nonmembers for the stated purpose of funding that political endeavor. And yet SEIU now implausibly argues that it did not "compel nonmembers to subsidize its political activities." SEIU's Br. 10.

That argument is risible. More importantly, it misses *Hudson*'s point. *Hudson*'s animating principle is that nonmembers "have a constitutional right to 'prevent the Union's spending a part of their required service fees to . . . express political views unrelated to its duties as exclusive bargaining representative.'" 475 U.S. at 301-02 (quoting *Abood*, 431 U.S. at 234). *Hudson*'s objective was to "avoid the risk that [nonmembers'] funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Id.* at 305 (quoting *Abood*, 431 U.S. at 244).

Hudson accepted the practical reality that a union may calculate its compulsory fee for an upcoming year based on "expenses during the preceding year." *Id.* at 307 n.18. That simply reflects that fact that, usually, the best the union can do is to extrapolate from the prior year's spending. *Id.* It does not absolve the union from taking further protective steps where—as here—it imposes a new assessment that *will, in fact, force nonmembers to contribute to nonchargeable political activities.* In that circumstance, SEIU must do more. If it does not, it commits the constitutional violation lying at *Hudson*'s core. And it fails to engage in the "careful tailoring" *Hudson* requires.

That SEIU's overall non-chargeable spending percentage for the year happened to end up lower, SEIU's Br. 12-15, changes nothing. The fact remains that with respect to *this assessment* (that lacked *Hudson* protections) SEIU knew and stated that the spending would be political, and yet it still extracted that money from the Nonmembers. That cannot be squared with *Hudson*.

2. Money is sometimes fungible, as SEIU emphasizes. SEIU's Br. 21-25. That does not help its case. The precedents SEIU cites explain that a union cannot solve the forced-association problem by collecting full union dues from objectors and segregating that money so that it is used only for collective bargaining, while non-objectors' dues are used for political activities. *See, e.g.*, *Abood*, 431 U.S. at 238 n.35. That segregation is unacceptable, the Court said, because more of member dues will be available for non-chargeable activities than they would be otherwise, with the effect that "the nonmember subsidizes the union's institutional activities." *Id.* (citation omitted). This is consistent with *Hudson*: it offers yet another protection to ensure that objecting nonmembers' money cannot be used for non-germane political causes, even indirectly.

That principle is hardly honored by holding—as SEIU would—that objectors can be forced to contribute to a fund *explicitly created to pay for political activity*, on the theory that money is fungible. In that circumstance, the objecting nonmember is being forced to contribute earnings directly to a disagreeable political cause. There is no need even to reach the fungibility question to determine that the nonmember is being compelled "'to furnish contributions of money for the propagation of opinions which he disbelieves.'" *Hudson*, 475 U.S. at 305 n.15 (quoting I. Brant, cited *supra* at 2).

Most of the funds SEIU collected during the special assessment went directly to nonchargeable political activity, as SEIU concedes. SEIU's Br. 4. The constitutional harm created by that forced exaction cannot be remedied *ex post*. *Hudson* recognized that the First Amendment requires not *ex post* remedies, but *ex ante* prophylaxis, rules designed to eliminate the risk that someone's hard-earned dollars would be taken for disagreeable political activity.

3. SEIU denies that it implemented the special assessment "solely" to fund political activities. SEIU's Br. 3-4 & n.4, 10, 25 n.12, 29. That contention does not withstand scrutiny. SEIU named its new fee an "Emergency Temporary Assessment to Build a Political Fight-Back Fund" and said it would be used for "a broad range of political expenses." *Supra* at 12-13. Although SEIU clings to the Ninth Circuit majority's statement that SEIU planned to "split the increase 'between political actions and collective bargaining actions,'" SEIU's Br. 29 (quoting Pet. App. A 6a), the dissenting opinion correctly recognized that the majority mischaracterized the record.

In fact, the letter to which the majority referred "does not state that the *fee increase* would be split between political and collective bargaining activities." It merely indicates that the yearlong political campaign as a whole would have non-political components. Pet. App. A 39a n.2 (Wallace, J., dissenting). Moreover, the agenda for the meeting to approve the fee stated that "[t]he funds from this emergency temporary assessment will be used specifically in the political arenas of California." *Id.* at 27a. SEIU consistently represented that it would spend its new fee on political advocacy—wholly non-chargeable advocacy, as we explain *infra* at 12-13.

4. SEIU repeatedly asserts that the Nonmembers seek a "substitute for the *Hudson* procedures." SEIU's Br. 11, 25. But that formulation assumes that *Hudson* developed one set of procedures invariably, universally, and perpetually sufficient, no matter the facts.

That assumption finds no support in *Hudson*. Rather, the question presented was whether the procedures the union used in that case were "constitutionally sufficient" to "minimize the infringement" created by the agency shop. 475 U.S. at 303-04. The Court concluded that "an adequate explanation of the basis for the fee," "a reasonably prompt opportunity to challenge the amount of the fee," and "an escrow for the amounts reasonably in dispute" were the minimum necessary procedures. *Id.* at 310. But the Court also considered whether other sorts of tailoring—for example, a 100% escrow—might be necessary and decided that they were not "[*o*]*n the record before us*." *Id.* (emphasis added). That suggests that on a different record, different procedures might be required to "minimize the infringement," *id.* at 303.

This is such a case. SEIU's procedures abjectly failed to provide "an adequate explanation of the basis" for the special assessment. *Id.* at 310. And they failed, most importantly, to "minimize the risk that nonunion employees' contributions might be used for impermissible purposes." *Id.* at 309. The result was a forced loan for SEIU's political activities—exactly what *Hudson* forbids.

5. Finally, SEIU disparages the Nonmembers' proposed rule as "subjective," requiring "predictions" about chargeable percentages. SEIU's Br. 25-28. SEIU misunderstands the proposed rule. The union would not have to guess the percentage of its fee increase to be dedicated to non-chargeable activities. Instead, the union would be foreclosed from collecting *any* of the mid-year increase from (i) already-objecting nonmembers and (ii) nonmembers who had not objected to the most recent *Hudson* notice but who object on being informed of the mid-year increase. *See supra* at 3; Pet. Br. 11.

That practical rule makes good sense because nothing less provides what *Hudson* demands: careful protection against "'the risk that dissenters' funds may be used temporarily for an improper purpose.'" 475 U.S. at 305 (quoting *Abood*, 431 U.S. at 244). After all, a mid-year fee increase is a new financial obligation unanticipated by the previous *Hudson* notice. Under *Hudson*, its imposition triggers the same need for disclosure as for the pre-existing financial obligation. If a union cannot make that disclosure, then the least restrictive means of protecting nonmembers' constitutional rights is to bar collection of the new obligation from objecting nonmembers until that information is available.

This rule would not, contrary to SEIU's lament (Br. 29), burden unions in their collection of compelled fees. Unions should infrequently need to impose mid-year fee increases anyway. SEIU and its *amici* provide no evidence that such increases are often used or essential. In those instances when a union does levy a mid-year exaction, the proposed rule merely means it could not collect the increase—a modest sum in most cases—from objecting nonmembers until the next *Hudson* notice. That such a small impediment would cause a union hardship is highly unlikely. If it did, the union would have multiple options—solicitation of voluntary donations; a short-term loan; a request to its international affiliate to "bring to bear its often considerable . . . resources," *Lehnert*, 500 U.S. at 523—that could provide the funds without simultaneously risking widespread infringement of nonmembers' associational rights.

As for the Nonmembers' narrower alternative rule—that a union cannot collect a mid-year fee increase from objecting nonmembers where its stated intent is political advocacy, *see supra* at 3—SEIU objects that a union could "easily evade[ ]" it by "making different statements or remaining silent." SEIU's Br. 25 n.12. Perhaps. But the Nonmembers would hope unions would be more forthright about the reasons for a mid-year fee increase—after all, they have to sell it to their members. Indeed, large unions follow quasi-legislative processes to adopt rule changes. That would render it difficult for them to hide under a veil of silence or misrepresentation.

In any event, that a union theoretically could "evade[ ]" the Nonmembers' proposed rule does not change the fact that *here*, SEIU was quite forthright: it announced that it was enacting a "Political Fight-Back Fund" to spend on "'political expenses.'" Pet.

App. A 6a. It should be held to its word, and required to ensure that such electioneering funds do not come out of objecting nonmembers' pockets.

III. REVERSAL ON THE SECOND QUESTION PRESENTED IS APPROPRIATE.

This Court should reach the chargeability question and hold that SEIU's political spending was not chargeable to objecting nonmembers.

A. The Issue Is Properly Presented.

1. Issues are properly presented when they are "discussed in the courts below," raised "in [the] petition for certiorari," and substantively addressed in the merits briefing. *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1214 n.1 (2011). The chargeability question fully satisfies these criteria. The Complaint stated a free-speech claim contesting SEIU's "spen[ding] on ballot propositions and other political and nonbargaining activities." Joint Appendix 20-23. The Nonmembers' "chief argument" below, as the Ninth Circuit majority recognized, was "*premised upon the alleged non-chargeability of the increase* (its *purely* political nature)." Pet. App. A 13a n.4 (first emphasis added). The majority squarely ruled on chargeability, holding that SEIU's expenditures to campaign against Proposition 76 were "not purely non-chargeable." *Id.* at 39a-40a n.2.[4] The dissent also reached the issue, finding SEIU's "challenge to [Proposition 76] . . . too

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[4] That is neither "suggest[ion]" nor "passing footnote," contrary to SEIU's claim (Br. 43); it is an explicit conclusion of law. And it was necessary to the opinion because the majority relied on it to reject the Nonmembers' "chief argument," Pet. App. A 13a n.4: that when a union imposes an assessment for political purposes providing no opportunity to object, *Hudson*'s core prohibition is violated.

attenuated to [its] collective bargaining agreement to be considered a chargeable expense." *Id.* at 43a n.4 (Wallace, J., dissenting). Finally, the Nonmembers included chargeability in their certiorari petition as a Question Presented for review, Pet. i, and the Court granted certiorari on both questions over SEIU's objection. *See* Br. Opp. 19-20. The question is properly presented.

2. SEIU argues that this Court cannot reach the chargeability question because the Nonmembers did not pursue a separate "*Lehnert* challenge," in addition to their "*Hudson* challenge." SEIU's Br. 43-46. SEIU argues, in other words, that this Court cannot rule on chargeability unless a plaintiff presses an entirely separate "'chargeability' claim" throughout a case. *Id.* at 44. To support that argument, SEIU asserts that the Nonmembers affirmatively waived any chargeability claim by stating, for example, that "[t]his case . . . is *solely* about whether Defendants have complied with *Hudson*." *Id.*

SEIU misunderstands the nature of a *Hudson* challenge. *Hudson* is not simply about adequate notice. It is about the principle that unions *cannot force nonmembers to subsidize a union's ideological activities*. *See* 475 U.S. at 303-05. That is why the Nonmembers advanced chargeability arguments to support their *Hudson* challenge, and why the court below necessarily addressed those arguments. The issues are inextricably intertwined. That makes chargeability a "necessary predicate to a correct evaluation of [the Nonmembers'] federal claim." *Employment Div.* v. *Smith*, 485 U.S. 660, 672 (1988).

Indeed, *Hudson*'s progeny make clear that the distinction SEIU posits is no barrier to this Court's review. In *Locke* v. *Karass*, 555 U.S. 207 (2009), for example, the complaint contained a single count advancing a *Hudson* challenge. *See* Complaint ¶ 40, *Locke* v. *Karass*, 2005 WL 2864196 (D. Me. 2005). Yet the plaintiffs also challenged the union's chargeability decisions as part of that claim, *see Locke* v. *Karass*, 498 F.3d 49, 66 (1st Cir. 2007), and both the court of appeals and this Court reached and decided the chargeability issue. *See id.*; *Locke*, 555 U.S. at 212, 221. The situation here is no different. SEIU's distinction between "notice challenges" and "chargeability challenges" is illusory.

That explains the Nonmembers' statements below now trumpeted by SEIU—in misleadingly excerpted form—as evidence of "waive[r]." SEIU's Br. 44. SEIU says, for example, that the Nonmembers told the district court that "[t]his case . . . is *solely* about whether Defendants have complied with *Hudson*." *Id.* What the Nonmembers actually said is: "This case . . . is solely about whether Defendants have complied with *Hudson in seizing the increase in dues and fees which has been earmarked primarily for political and other nonbargaining activities*." Docket No. 45 at 6 (emphasis added). SEIU conveniently omits the emphasized words, failing to include an ellipsis showing their omission. SEIU's Br. 44. The full statement demonstrates—as does the rest of the record—that the Nonmembers have always contested the chargeability of the special assessment as part of their lawsuit.

3. SEIU separately argues that the Nonmembers' chargeability argument "is particularly inappropriate as to nonobjectors" because they never opposed being charged for SEIU's political expenses. *Id.* at 45. This argument is doubly flawed. First, it again fails to recognize that the chargeability argument is, and

always has been, intertwined with the *Hudson* argument. Second, it ignores that the Nonmembers were left "in the dark about the source of the figure for the" special assessment, *Hudson*, 475 U.S. at 306, not informed that it would be used to oppose a ballot initiative, and not given the opportunity to object to its exaction because SEIU failed to provide them with the required *Hudson* notice.

For all of these reasons, the Court should decide the second Question Presented.

B. The Ninth Circuit's Chargeability Holding Should Be Reversed.

SEIU's contentions on the merits are equally unconvincing. It argues that expenditures to fight Proposition 76 were chargeable because they "related directly to the 'implementation of [the] collective-bargaining agreement.'" SEIU's Br. 49 (quoting *Lehnert*, 500 U.S. at 527). But as SEIU admits (Br. 50 n.25), Proposition 76 merely would have given the governor authority to reduce state spending across the board. SEIU's political expenditures fail all of *Lehnert*'s tests.

As to *Lehnert*'s first prong, the Court plurality explained that an activity must be "oriented toward *the ratification or implementation* of [the] collective-bargaining agreement" to be chargeable. 500 U.S. at 527 (emphasis added). It accordingly rejected attempts to charge nonmember public education employees for political activities to obtain "financial support of [their] profession," specifically, "funds for public education." *Id.* at 520, 527. But that is what SEIU wants here. Political action opposing an initiative that would give a governor authority to cut state funding from which state employees might be paid is, precisely, political action favoring "financial support of the [state employees'] profession." *Id.* at 520. It is "too attenuated" from SEIU's "function as bargaining representative" to be chargeable. *Id.* Application of Justice Scalia's "statutory duties" test, *id.* at 558, yields the same result. SEIU has no statutory *duty* to campaign against gubernatorial authority to cut funding for state employees, even if it enjoys statutory *authorization* to do so. The statutes SEIU cites (Br. 51) are not to the contrary. Only one mentions anything remotely relevant, providing that the portion of union dues "subject to refund" to an objecting nonmember "shall not reflect . . . the costs of support of lobbying activities designed to foster . . . collective negotiations and contract administration." CAL. GOV'T CODE § 3515.8. This merely offers the state legislature's perspective on what counts as a non-chargeable expense, an issue on which this Court has the final say. *See Abood*, 431 U.S. at 232.

No matter which screening test is applied, SEIU's spending fails *Lehnert*'s second prong because it cannot be "justified by the government's vital policy interest in labor peace and avoiding 'free riders.'" 500 U.S. at 519. SEIU argues that "labor peace" is implicated here because "authorizing the Governor to abrogate labor agreements could lead to labor unrest among the state's workforce." SEIU's Br. 51. That utterly misconstrues this Court's "labor peace" rationale, which means "free[ing] the employer from the possibility of facing conflicting demands from different unions." *Abood*, 431 U.S. at 221. The Court certainly has never said the government can overbear nonmembers' rights based on some vague concern about "labor unrest among the . . . workforce." SEIU's Br. 51. If the "labor peace" rationale were so broad, then nonmembers could be forced to support union opposition to any proposed law that could upset union officials. Chargeable expenditures would have no limit. That is not, and cannot possibly be, the law.

Likewise, SEIU's spending fails *Lehnert*'s third prong because it "significantly add[s] to the burdening of free speech . . . inherent in the agency shop." 500 U.S. at 519. Proposition 76, while it may have had incidental effect on SEIU's bargaining agreements, proposed a law of *general* application, a "monetary and other policy choice[ ]" with "ramifications that extend into diverse aspects of an employee's life." *Id.* at 521 (plurality opinion). SEIU's exaction thus compelled Nonmembers' speech "in a public forum" and on "the discussion of governmental affairs, which is at the core of our First Amendment freedoms." *Id.* at 522, 529. That sort of burden "extends far beyond the acceptance of the agency shop and is constitutionally impermissible." *Id.*

CONCLUSION

This Court should reverse the judgment below on both Questions Presented.

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December 2011

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 10-1121

IN THE

Supreme Court of the United States

Dianne Knox, *et al.*,
Petitioners,
v.
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 57 national and international labor organizations with a total membership of approximately 12.2 million working men and women.[1] This case concerns the constitutional requirements for a union's collection of agency fees pursuant to a union security clause in a collective bargaining agreement with a public employer. The AFL-CIO has numerous affiliates that represent public employees and, where allowed by state law, it is common for these affiliates to negotiate contract clauses requiring all represented employees to share the costs of collective bargaining by paying an agency fee based on the amount of regular membership dues.

STATEMENT

In accord with this Court's decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), Service Employees International Union Local 1000 annually sends all nonmembers covered by the union's agency shop clause a notice explaining their right to object to paying the portion of agency fees going for activities that are not germane to collective bargaining.[2] Local 1000 sent such a *Hudson* notice in June 2005, explaining that the agency fee for the period July 1, 2005 through June 30, 2006 would be "no more than 99.1% of regular membership dues," JA 98, and that objecting nonmembers would be charged "no more than 56.35% of regular membership dues," JA 102. The reduced fee charged to objecting nonmembers was based on an audit of Local 1000's expenditures during its most recent fiscal year ending December 31, 2004, which was included in the *Hudson* notice. JA 107.

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[1] Counsel for the petitioners and counsel for the respondent have each consented to the filing of this *amicus* brief. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

[2] *Hudson* held that "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of

The June 2005 *Hudson* notice explained that Local 1000's "[r]egular monthly membership dues are currently 1.0% of monthly gross salary and are presently capped at a maximum of $45 per month" but that "[d]ues are subject to change without further notice to fee payers." JA 98. Thereafter, Local 1000 did "increase[] the regular membership dues in an amount equal to .0025 (two and one-half tenths of one percent) of gross wages." JA 31.[3] While Local 1000 characterized this as "a temporary dues increase" that would apply "during the pay periods between September 1, 2005 and December 31, 2006," JA 31, the Local 1000 dues in fact increased further in 2007 to "1.5% of monthly gross salary," "capped at a maximum of $90 per month," JA 219.

Local 1000 did not issue a second *Hudson* notice at the time of the September 2005 dues increase. Rather, as the union's first *Hudson* notice contemplated, the union simply charged those nonmembers who had objected in

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the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310.

[3] "The $45 per month cap on [the] regular dues of 1% of gross . . . continue[d] in effect, but [did] not apply to th[e] additional .0025 temporary increase." JA 31.

response to the June 2005 notice an agency fee equal to 56.35% of the increased dues amount and charged those nonmembers who had not objected an agency fee equal to 99.1% of the increased dues amount. Local 1000's June 2006 *Hudson* notice did reflect the increased dues amount, and the fee reduction for objectors during the July 2006 – June 2007 period covered by that notice was based on all of the union's expenditures during the fiscal year ending in December 2005, including the expenditures of funds generated by the September 2005 increase in dues. JA 154, 165-66, 190.

Characterizing the September 2005 dues increase as "a special assessment for opposition to ballot initiatives," the petitioners maintain that the Ninth Circuit "erred in holding that SEIU's June 2005 *Hudson* notice covering ordinary dues collections sufficed to cover the special political assessment commencing in September 2005." Pet. Br. 20.[4] Because "[t]he June 2005 notice only concerned regular dues and fees," the petitioners assert that "[i]t gave no notice concerning the later political assessment, much less an opportunity to make an informed objection to paying that assessment." *Ibid.*

SUMMARY OF ARGUMENT

The petitioners' brief addresses the question whether a union that has negotiated an agency fee agreement with a public employer and has already provided a *Hudson* notice informing agency fee payers of their right to object to paying the full agency fee and of the amount that will be charged objectors during the coming year may "condition employment on the payment of a special assessment intended solely for political purposes . . . without first providing [an additional] *Hudson* notice that includes information about that assessment and provides an opportunity to opt out of supporting those political exactions?" Pet. Br. i. That question is not presented by this case, because what the petitioners characterize as "a special assessment" was, in fact, nothing more than an across-the-board increase in the regular membership dues.[6]

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[4] In characterizing the September 2005 increase as "a special assessment," the petitioners rely solely on an internal union communication describing the increase as a "temporary assessment," JA 25, however, the union's statements to its members and to the fee payers accurately described it as a "dues increase," JA 28 & 31.

ARGUMENT

The legal question the petitioners pose to this Court is whether "[t]he [annual notice] procedure *Hudson* approved for regular dues and fees" is sufficient "when the union levies a special assessment to fund a particular political campaign" that had not been forecast and accounted for in its annual notice. Pet. Br. 22-23. The petitioners argue that the answer to this legal question is "no," because such special "'[a]ssessments' are, by definition, distinguishable from union dues," *id.* at 22 n. 7, in a way that is material to a union's notice obligations under *Hudson*.

The factual predicate for the petitioners' legal argument is that "SEIU did not impose a permanent, across-the-board increase in dues and fees for general purposes" in September 2005 but, "[i]nstead, . . . imposed a special assessment for specific purposes, for a limited time, and not for general union functions." Pet. Br. 22. The petitioners have not established the factual predicate for making their legal argument. What the record shows is that the September 2005 increase was an across-the-board increase in regular membership dues and not a spe-

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[5] The second question posed by the petitioners is not even arguably presented by this case. *See* Resp. Br. 43-46.

cial assessment. Thus, the legal question posed by the petition for certiorari is not presented by this case.

1. The petitioners are correct that special "'[a]ssessments' are, by definition, distinguishable from union dues." Pet. Br. 22 n. 7.[6] The generally accepted definitions of these terms are as follows:

> "In labor parlance it is generally recognized that dues contemplate regular, periodic and recurring payments imposed as part of the privilege of belonging to a Union. Assessments, on the other hand, are not collected as regular or continuing payments, but only when special circumstances give rise to the need for extra money. An assessment may also be defined as a charge levied by the Union on each of its members for a special purpose not covered by regular dues." *Bemis Bros. Bag Co.*, 14 Lab. Arb. Rep. (BNA) 685, 687 (1950)(Lindquist, Arb.).[7]

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[6] For example, the Labor Management Reporting and Disclosure Act governing private sector unions distinguishes between "regular dues or fees or other periodic payments required to remain a member," 29 U.S.C. § 431(a)(4), and the "levying of assessments," 29 U.S.C. § 431(a)(5)(B). And, with respect to the "levying of assessments," *ibid.*, that statute specifically takes account of both "general . . . assessment[s]" and "special assessment[s]." 29 U.S.C. § 411(a)(3).

[7] *Accord NLRB v. Food Fair Stores, Inc.*, 307 F.2d 3, 11 (3d Cir. 1962) ("It is clear that the term 'periodic dues' in the usual and ordinary sense means the regular payments imposed for the benefits to be derived from membership to be made at fixed intervals for the maintenance of the organization. An assessment, on the other hand, is a charge levied on each member in the nature of a tax or some other burden for a special purpose, not having the character of being susceptible of anticipation as a regularly recurring obligation as in the case of 'periodic dues.'"); *Pacific Northwest Newspaper Guild v. NLRB*, 877 F.2d 998, 1000 (D.C. Cir. 1989) (same).

The petitioners' argument that "[t]he procedure *Hudson* approved for regular dues and fees" does not provide adequate protection for objectors "when the union levies a special assessment to fund a particular political campaign," rests on the general understanding that "a special assessment" is a charge levied "for a limited time" to fulfill "specific purposes" that are not among "general union functions." Pet. Br. 22-23. In each of these three respects, the September 2005 increase represented an increase in "regular dues" and not a "special assessment." Thus, the petitioners' argument that special assessments require a different "procedure [than the one] *Hudson* approved for regular dues and fees" is irrelevant to this case.[8]

First, the September 2005 increase undeniably "contemplate[d] regular, periodic and recurring payments." *Bemis Bros. Bag*, 14 Lab. Arb. Rep. at 687. What Local 1000 did – and the only thing the union did – was to change the amount of "[r]egular monthly membership dues" from "1% of monthly gross salary," JA 98, to 1.25% of monthly gross salary. The September 2005 increase did not take the form of "a charge levied" on the employees on a one-time basis but rather imposed "a regularly recurring obligation." *Food Fair Stores*, 307 F.2d at 11. It is true that the increase was initially described as "temporary," but the contemplated period of the "temporary" increase encompassed 16 months – from September 1, 2005 through December 31, 2006, JA 31 – long enough to establish the increased dues amount as "a regularly recurring obligation." *Food Fair Stores*, 307 F.2d at 11. Moreover, the increase proved to be anything but "temporary," as Local 1000 further increased the amount of regular dues to 1.5% of gross monthly salary in 2007. JA 219.

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[8] We would emphasize that, while establishing that the September 2005 increase had the nature of a special assessment is a necessary condition for the plaintiffs to advance their legal claim regarding the necessity for a second *Hudson* notice, it is not a sufficient condition to establish the validity of that claim. In *Machinists v. Street*, 367 U.S. 740 (1961), the Court noted that many rail unions "had only nominal dues" and imposed "assessments" to finance particular "activities" that could "vary month by month," *id.* at 766, yet the Court suggested that the amounts charged to objecting nonmembers be reduced by "the proportion of the union's *total* expenditures made for [objectionable] political activities to the union's *total* budget," *id.* at 775 (emphasis added). In other words, even in the setting where true special assessments were common, the Court clearly indicated that the special assessments did not need to be treated on a one-by-one basis in calculating the amount to be paid by objecting nonmembers.

Second, the increase was *not* "a charge levied . . . for a special purpose," *Bemis Bros. Bag*, 14 Lab. Arb. Rep. at 687, in the sense of being reserved for a specified purpose. Thus, Local 1000's Chief Financial Officer testified that the income from the dues increase was *not* placed in "a special segregated fund." JA 303. This undisputed testimony refutes the assertion by the dissent below that the increase went into "a special purpose fund." Pet. App. 39a. While the proposal to increase dues did justify that action on the grounds that the increased revenues would be used for "a broad range of political expenses" and not "for the regular costs of the union," JA 26, the resolution increasing dues did not bind the union with respect to the use of the additional income. And, the record evidence shows that the increased revenues were placed in the general fund and were used like other revenues placed in that fund to cover the full range of typical union activities. JA 165-66, 190, 230-32, 258-59.

Finally, the need advanced to justify the increase did *not* indicate "a special purpose" of a sort that was "not covered by ordinary dues." *Bemis Bros. Bag*, 14 Lab. Arb. Rep. at 687. The dues proposal justified the increase as necessary to oppose a number of initiatives advanced by the Governor that Local 1000 believed would adversely affect the employment interests of the employees the union represents. JA 26. As the annual *Hudson* notices stated, Local 1000 routinely "[i]ntroduced, [s]upported and [o]pposed [l]egislation" that affected the interests of represented employees. JA 122. Thus, even if the extra revenue generated by the September 2005 dues increase had been devoted solely to fighting the initiatives – an extremely unlikely proposition, since the revenue from the increase would not begin arriving until October 2005 and the initiatives were on the ballot in early November 2005 – the net effect would have been to free the portion of "ordinary dues" that would have been otherwise spent on the initiatives for other uses. In other words, reserving the increased revenues for the initiative campaigns would have been a matter "of bookkeeping significance only rather than a matter of real substance." *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 753 (1963).

The petitioners do not deny that in each of these three respects the record evidence shows that, as implemented, the September 2005 increase was, in fact, an "across-the-board increase in dues and fees for general purposes" and not "a special assessment for specific purposes." Pet. Br. 22. Rather, the petitioners depend entirely on the characterization of the increase contained in the proposal submitted by the Local 1000 Special Defense Budget Committee to the Local 1000 Council, which had to vote to approve the dues increase.[9] Citing John Rawls' concept of a "veil of ignorance" – which they seem to misunderstand – the petitioners assert that it is necessary "to take the union at its word as to the purpose [of the] assessment." Pet. Br. 22 n. 8. But, on that theory, the increase should be treated as "a temporary dues increase," since that is how the union itself described the increase to the fee payers. JA 31. In any event, the petitioners cannot really mean that the union's prior description of its expected actions substitutes for evidence of what the union actually did.

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[9] The Budget Committee's proposal to the Council did misdescribe the increase as an "emergency temporary assessment to build a political fight-back fund." JA 25 (capitalized in original). As nonmembers, the petitioners were not represented on the Council. *See Pattern Makers v. NLRB*, 473 U.S. 95, 108 n. 18 (1985) ("By resigning [union membership], the worker surrenders his right to vote for union officials, . . . and even to participate in determining the amount or use of dues he may be forced to pay under a union security clause."). Thus, their claim is not that the Budget Committee misrepresented the dues increase to the Council but rather that the Budget Committee's mischaracterization of the dues increase as an "assessment" is binding on Local 1000.

2. The correct characterization of the 2005 increase is not merely a matter of semantics. The difference between special assessments and periodic dues goes to the essence of the petitioners' legal argument that "a special union assessment intended *solely* for political purposes" requires "a [separate] *Hudson* notice that includes information about *that* assessment and provides an opportunity to opt out of supporting *those* political exactions." Pet. Br. i (emphasis added).

Precisely because the income from the 2005 increase was *not* set aside "solely for political purposes," Local 1000 did not have any particular "information about [the future use of] that assessment" at the time of the increase. Pet. Br. i. Thus, the most that Local 1000 could have done would have been to reissue its June 2005 *Hudson* notice in September 2005, changing the statement that "[r]egular membership dues are currently 1.0% of monthly gross salary" to "[r]egular membership dues are currently 1.[25]% of monthly gross salary." JA 98. However, the June 2005 notice had forecast the possibility of such a change in the amount of dues by carefully explaining that, while the dues were "*currently* 1.0% of monthly gross salary," they "are subject to change without further notice to fee payers." JA 98 (emphasis added).

Against that background, a second notice in September 2005 would have done nothing to "prevent[] compulsory subsidization of ideological activity by employees who object thereto." *Hudson*, 475 U.S. at 302, quoting *Abood v. Detroit Board of Education*, 431 U.S. 209, 237 (1977). On the other hand, requiring the issuance of a second notice would have "restrict[ed] the Union's ability to require every employee to contribute to the cost of collective- bargaining activities." *Ibid.* This is so, because requiring the issuance of a second notice and the processing of a second round of objections would have imposed a substantial "additional burden . . . on the union," increasing the "administrative" expenses associated with requiring all employees to share the cost of collective bargaining. *Ellis v. Railway Clerks*, 466 U.S. 435, 444 (1984).

The *Hudson* opinion carefully delineated the "constitutional requirements for the Union's collection of agency fees," 475 U.S. at 310, in a manner that "does not impose an undue burden on the union," *id.* at 306 n. 17. Thus, in setting the procedural requirements, the *Hudson* Court held: i) that "[t]he Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures," *id.* at 307 n. 18; ii) that "a full-dress administrative hearing, with evidentiary safeguards," is *not* required to review the union's fee calculation, *id.* at 308 n. 21; and iii) that "a 100% escrow" of objectors' fees is *not* required during the period before calculation disputes are resolved, *id.* at 310. Each of those measures would undoubtedly have advanced the interest of objecting fee payers to some degree, but each was rejected on the ground that the additional benefit to the objecting fee payers was outweighed by the additional cost to the union. Requiring Local 1000 to send out a second *Hudson* notice after the September 2005 dues increase would likewise "impose an undue burden on the union." *Id.* at 306 n. 17.

In sum, the September 2005 increase was, in fact, an "across-the-board increase in dues and fees for general purposes" and not "a special assessment for specific purposes." Pet. Br. 22. That being so, the question of whether "[t]he procedure *Hudson* approved for regular dues and fees" is sufficient "when the union levies a special assessment to fund a particular political campaign," *id.* at 22-23, is not presented by this case.

CONCLUSION

The Court should affirm the decision of the Ninth Circuit or dismiss the writ of certiorari as improvidently granted.

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BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* is submitted with the consent of the parties,[1] on behalf of the National Education Association (NEA), a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed as teachers in public schools and colleges throughout the United States. NEA operates through a network of affiliated organizations: it has as state affiliates an organization in each of the 50 states and the District of Columbia, and has approximately 14,000 local affiliates in individual school districts, colleges, and universities throughout the United States. Pursuant to procedures that comply with this Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), NEA and its affiliates collect agency fees from nonmembers in 20 states.

Petitioners argue in this case that a public-sector union must adopt procedures above and beyond those specified in *Hudson* when it enacts certain kinds of special assessments. NEA and its affiliates have a strong interest in this issue not only in its own right, but because Petitioners have based their argument on the proposition that, in determining whether a union's agency fee system includes adequate "procedural safeguards," *Hudson*, 475 U.S. at 302, the courts should apply "strict scrutiny." Adoption of that proposition would cast the law in this area into disarray. NEA submits this brief to show that

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[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

Petitioners' attempt to subject agency fee procedural safeguards to "strict scrutiny" cannot be squared with *Hudson* and with the decades of union fee caselaw that preceded that decision, or with First Amendment jurisprudence generally.

SUMMARY OF ARGUMENT

Nearly fifty years ago, this Court declared in *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), that courts should not impose agency fee requirements that are "likely to infringe the unions' right" to expend fees obtained from *all* employees "in support of activities germane to collective bargaining." Thus in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475, U.S. 292, 302 (1986), the Court held that in determining what procedures should be required to protect objecting feepayers' First Amendment rights, "the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto *without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities*" (emphasis added).

This Court's agency fee decisions do not treat the fashioning of procedural safeguards as a matter that is subject to "strict scrutiny," but as a pragmatic effort to provide a meaningful level of prophylactic protection of dissenters' First Amendment interests without imposing undue burdens that would impinge on a union's ability to require all employees to contribute to the cost of union activities germane to collective bargaining.

That mode of analysis is consistent with this Court's treatment of procedural safeguards in other First Amendment contexts. "[N]ot every procedure that may safeguard protected speech is constitutionally mandated." *Waters v. Churchill*, 511 U.S. 661, 670 (1994) (plurality opinion). Rather, the Court has made clear that such requirements must be tempered by competing considerations, including in particular the costs and administrative burdens a proposed procedure would entail. *Id.*

Thus, the Court never has subjected proposed procedural safeguards of First Amendment rights to a regime of strict scrutiny. And to do so would be to apply First Amendment scrutiny to a question it is not designed to answer. First Amendment "scrutiny" – whether strict or otherwise – pertains to *substantive burdens* on speech, not to *procedural protections* of speech; it is a means of assessing whether a particular burden on speech is supported by an appropriate justification. Fashioning *prophylactic protections* for speech is a very different enterprise from scrutinizing *restrictions* on speech, and calls for a more nuanced calculus. To inject "strict scrutiny" into the fashioning of procedural safeguards, in the agency fee context or in other First Amendment contexts, would be to untether the law of strict scrutiny from its moorings.

ARGUMENT

In *Hudson*, this Court observed that two distinct forms of First Amendment questions are presented by agency fee systems established pursuant to governmental authorization.

First is the question of what kinds of union activities an employee who has chosen not to become a union member can be required to support financially and what kinds of activities are of such a nature that financial support cannot constitutionally be compelled of an objecting nonmember. *See Hudson*, 475 U.S. at 301-02. The drawing of that line between "chargeable" and "nonchargeable" activities has been the subject of several decisions of this

Court, the most recent being *Locke v. Karass*, 555 U.S. 207 (2009) and *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). Petitions' second Question Presented, regarding the chargeability *vel non* of expenditures incurred by a union in opposing a certain kind of ballot initiative, is in this category; but we do not address that question because it is not properly presented by this case. *See* Brief for Respondent at 43-48.

Once the "basic distinction," *Hudson*, 475 U.S. at 302, between chargeable and nonchargeable activities has been drawn, a second question remains: "whether the procedure used by [a union to collect agency fees] adequately protects th[at] basic distinction," *id*. This matter of "procedural safeguards," *id*., is the subject of Petitioners' first Question Presented.

Petitioners argue the fashioning of such procedural safeguards is subject to "strict scrutiny." But as we will show in Part I, this Court's union fee decisions going back some fifty years and culminating in *Hudson* have never suggested that strict scrutiny governs the formulation of procedures for assessing and collecting fees from objecting nonmembers; rather, those decisions adopt a mode of analysis that is fundamentally different from strict scrutiny.

In Part II, we show that this Court's treatment of First Amendment procedural safeguards in the agency fee context, and in particular the Court's recognition of the need to avoid "impos[ing] an undue burden on the union," *Hudson*, 475 U.S. at 306 n.17, is fully consistent with the manner in which the Court has approached the fashioning of procedural safeguards in other First Amendment contexts. Strict scrutiny, which pertains to certain kinds of *substantive burdens* on speech but not to *procedural safeguards* for speech, has no place in that endeavor.

I. FOR NEARLY FIFTY YEARS, THIS COURT HAS ANALYZED AGENCY FEE PROCEDURAL SAFEGUARDS WITHOUT RESORT TO STRICT SCRUTINY, PURSUING THE DUAL OBJECTIVE OF PREVENTING COMPULSORY SUBSIDIZATION OF IDEOLOGICAL ACTIVITY BY EMPLOYEES WHO OBJECT THERETO WITHOUT RESTRICTING A UNION'S ABILITY TO REQUIRE EVERY EMPLOYEE TO CONTRIBUTE TO THE COST OF ACTIVITIES GERMANE TO COLLECTIVE BARGAINING

A. Since *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), which arose under the agency fee provisions of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, this Court has recognized as a general principle that requiring "financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate . . . the First . . . Amendment[]." 351 U.S at 238.

In *Hanson*, however, there was no indication that the fee at issue was used for political or other purposes unrelated to collective bargaining, or that affected employees objected to the use of the fee for such purposes. Such circumstances were presented soon after in *International Association of Machinists v. Street*, 367 U.S. 740 (1961). This Court there concluded that, in light of the First Amendment's protections against compelled speech and association, the agency-fee provisions of the Railway Labor Act must be "construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." *Id.* at 768-69. The *Street* Court recognized, however, that because a substantive violation of the First Amendment arises only when funds are used for political purposes opposed by the feepayer, any remedy "would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object." *Id.* at 774. And, because "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee," a union "should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities." *Id.*

In *Railway Clerks v. Allen*, 373 U.S. 113 (1963), this Court gave more concrete consideration to fashioning a system that adequately addressed both the substantive protection of objecting feepayers' rights and the union's legitimate interest in the use of funds from members and nonobjecting feepayers. The Court observed that "[a]bsolute precision" in the calculation of the chargeable portion of the fee "is not, of course, to be expected or required," and added that "no decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions . . . in support of activities germane to collective bargaining and, as well, to expend nondissenters' such exactions in support of political activities." *Id.* at 122. In light of those considerations, the *Allen* Court envisioned a "practical decree" that would give objecting feepayers an advance rebate "of a portion of the exacted funds in the same proportion that union political expenditures bear to total union expenditures." *Id.* The Court also "encourage[d] . . . unions to consider the adoption by their membership of some voluntary plan by which dissenters would be afforded an internal union remedy." *Id.* at 122.

Subsequently, in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court affirmed that the principles articulated under the Railway Labor Act in *Hanson*, *Street*, and *Allen* applied with equal force to agency-fee arrangements in public-sector collective bargaining. In particular, the *Abood* Court held that public-sector unions may collect an agency fee from nonmembers for activities germane to collective bargaining, but that the First Amendment forbids compelling contributions from objecting feepayers for "ideological activities unrelated to collective bargaining." 431 U.S. at 236.

But the Court held in *Abood* that protecting that right of objecting feepayers cannot be the sole consideration in determining the elements of an agency fee system. Rather, "the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto *without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.*" *Id.* at 237 (emphasis added). To that end, this Court reiterated the statement in *Allen* that "no decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions ... in support of activities germane to collective bargaining and, as well, to expend nondissenters' such exactions in support of political activities." *Id.* at 239 n.40 (quoting *Allen*, 373 U.S. at 122).

Thus the law stood until *Hudson*, where this Court articulated a set of minimum procedures required by the First Amendment for the collection of an agency fee by a public-sector union.

The procedural safeguards elaborated by the *Hudson* Court had three components: (1) a notice requirement for giving nonmembers "an adequate explanation of the basis for the fee"; (2) a hearing requirement providing nonmembers "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker"; and (3) an escrow requirement "for the amounts reasonably in dispute while [objecting feepayer] challenges are pending." 475 U.S. at 310. Adhering to *Abood's* teaching that "[t]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities," *Hudson*, 475 U.S. at 302 (quoting *Abood*, 431 U.S. at 237), in defining the contours of each of those three requirements the *Hudson* Court took into account both the benefit of each proposed safeguard to feepayers and the burdens that would be imposed on the union.

First, with respect to the notice requirement, the Court held that "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake, ... dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee." *Id.* at 306. At the same time, the Court was careful to note that such a requirement would be "limited" so as not to "impose an undue burden on the union." *Id.* at 306 n.17. Accordingly, the fee calculation contained in the union's notice could be calculated "on the basis of its expenses during the preceding year," and the accompanying explanation for the fee did not require "an exhaustive and detailed list of all its expenditures," but only "the major categories of expenses, as well as verification by an independent auditor." *Id.* at 307 n.18.

Second, with respect to the hearing requirement, *Hudson* reasoned that an impartial decisionmaker was necessary because the objecting feepayer "is entitled to have his objections addressed in an expeditious, fair, and objective manner." *Id.* at 307. The Court nonetheless rejected as too burdensome the kinds of "special judicial procedures" that are required in certain First Amendment contexts. *Id.* at 307 n.20 (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Blount v. Rizzi*, 400 U.S. 410 (1971); *Freedman v. Maryland*, 380 U.S. 51 (1965)). The Court also rejected the notion "that a full-dress administrative hearing, with evidentiary safeguards, is part of the 'constitutional minimum,'" and instead indicated that the hearing requirement would be satisfied by "an expeditious arbitration . . . , so long as the arbitrator's selection did not represent the [u]nion's unrestricted choice." *Hudson*, 475 U.S. at 308 n.21.

Finally, although the *Hudson* Court required that a union place in escrow "the amounts reasonably in dispute while [an objecting feepayer's] challenges are pending," it expressly rejected the notion that "a 100% escrow is constitutionally required," *id.* at 310, reasoning that such a requirement would have "the serious defect of depriving the Union of access to some escrowed funds that it is unquestionably entitled to retain." *Id.*

In all of these respects, far from imposing the most protective possible procedures, *Hudson* established a "constitutional floor for unions' collection and spending of agency fees," *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 185 (2007), leaving individual public employers and unions free to decide whether to adopt additional procedures which, even if they would be more protective of dissenters' interests, are not constitutionally mandated, *id.*

B. As the foregoing recital makes plain, in none of the Court's decisions addressing procedural safeguards for the payment of agency fees by dissenting nonmembers has the Court treated those safeguards as subject to "strict scrutiny." Having declared nearly fifty years ago that courts may not impose requirements "which appear[] likely to infringe the unions' right," *Allen*, 373 U.S. at 122, to require objectors to pay their fair share of activities germane to collective bargaining, this Court's subsequent decisions have admonished against "restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302; *Abood*, 431 U.S. at 237. The corollary articulated in *Allen*, that "[a]bsolute precision" cannot be required in determining the chargeable portion of a union fee, 373 U.S. at 122, likewise is reiterated in *Hudson, see* 475 U.S. at 307 n. 18, and informs *Hudson's* recognition that procedural requirements should be "limited" so as not to "impose an undue burden on the union," *Hudson*, 475 U.S. at 306 n.17, or to engender "the serious defect of depriving the Union of access to ... funds that it is unquestionably entitled to retain," *id.* at 310.

Hudson thus stands squarely on the shoulders of this Court's union fee decisions extending back some fifty years, none of which has invoked "strict scrutiny" in determining the procedures unions must adopt to safeguard the First Amendment rights of objecting feepayers, and all of which have emphasized that objectors' rights not to be required to support nonchargeable union activities must be protected through procedures that do not restrict the *union's* right, under a constitutional agency fee arrangement, to require objectors to pay their *pro rata* share of the union's chargeable expenditures, through practical measures that do not subject the union to undue burdens.

II. THIS COURT'S AGENCY FEE JURISPRUDENCE IS CONSISTENT WITH THE APPROACH THE COURT HAS FOLLOWED IN FASHIONING PROCEDURAL SAFEGUARDS IN OTHER FIRST AMENDMENT CASES, NONE OF WHICH HAS TREATED SUCH SAFEGUARDS AS SUBJECT TO STRICT SCRUTINY

Nor has strict scrutiny been applied when, in other contexts, this Court has addressed procedural protections for First Amendment interests. On the contrary, the emphasis in this Court's agency fee decisions on the need to avoid "restricting," *Abood*, 431 U.S. at 237, or "infring[ing]," *Allen*, 373 U.S. at 122, a union's ability to collect from all employees fees to support activities germane to bargaining is of a piece with the consideration of competing legitimate interests that has always guided the Court's formulation of First Amendment procedural safeguards.

A. In evaluating the procedures that should be considered to be mandated by the First Amendment in the context of an agency fee system, the *Hudson* Court recognized that the Court had dealt with similar questions in a number of other areas of First Amendment law, adopting "procedural safeguards ... to insure that the government treads with sensitivity in areas freighted with First Amendment concerns." 475 U.S. at 303 n.12.

For instance, although prior restraints on speech are not unconstitutional per se, this Court has required governmental entities to maintain stringent administrative and judicial-review procedures before imposing such restraints on the distribution of obscene publications or the showing of obscene films or plays. *See Southeastern Promotions*, 420 U.S. at 558-62; *Freedman*, 380 U.S. at 58-59; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70-72 (1963). Similarly, where judicial proceedings threaten to penalize protected speech, this Court has required additional safeguards such as a particular allocation of the burden of proof, a particular quantum of proof, or a particular type of appellate review. *See Speiser v. Randall*, 357 U.S. 513, 526 (1958) (holding that, in a proceeding to determine tax liability, the government must bear burden of proving that speech is unprotected); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (holding that, in a public figure's libel action, actual malice must be proven by clear and convincing evidence); *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 503-11 (1984) (holding that, in a product disparagement case raising First Amendment concerns, an appellate court must make an independent judgment about the presence of actual malice).

The fashioning of First Amendment procedural safeguards has not been limited to administrative or judicial proceedings. For example, this Court has held that a public employer must give an employee the procedural protection of a "reasonable investigation" before she is discharged or punished for engaging in constitutionally unprotected speech. *Waters v. Churchill*, 511 U.S. 661, 668-82 (1994) (plurality opinion); *id.* at 682-83 (Souter, J. concurring). And, in a context that closely parallels a unions' collection of agency fees from nonmembers, this Court has held that an integrated bar association must erect notice-and-objection procedures that allow objecting lawyers the opportunity to prevent a portion of their bar dues from being used for political activities that are not germane to regulating the legal profession and improving the quality of legal services. *Keller v. State Bar of Cal.*, 496 U.S. 1, 13-17 (1990).

In the First Amendment cases in which this Court has adopted these kinds of prophylactic procedural safeguards, the Court has emphasized that "not every procedure that may safeguard protected speech is constitutionally mandated," and that the assessment for "each procedure involves a different mix of administrative burden, risk of erroneous punishment of protected speech, and risk of erroneous exculpation of unprotected speech." *Waters*, 511 U.S. at 670 (plurality opinion). "[T]he balance need not always be struck in th[e] direction" of providing greater insulation of protected speech. *Id.* "[The Court has] never, for instance, required proof beyond a reasonable doubt in civil cases where First Amendment interests are at stake, though such a requirement would protect speech more than the alternative standards would." *Id.* "Likewise, the possibility that defamation liability would chill even true speech has not led [the Court] to require an actual malice standard in all libel cases." *Id.* "Nor has the possibility that overbroad regulations might chill commercial speech convinced [the Court] to extend the overbreadth doctrine into the commercial speech area." *Id.*

As this Court's decisions thus make plain, "[t]he propriety of a proposed procedure must turn on the particular context in which the question arises – on the cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase." *Id.* at 671. Indeed, in some cases, even where a challenged practice entails a "high potential for intrusion on . . . First Amendment rights," the Court has found it practical and appropriate to require only minimal procedural protections. *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 232, 234 (2000) (holding that the only procedural safeguard necessary for a public university's system of using mandatory fees to subsidize various student groups is to apply "viewpoint neutrality as the operational principle").

B. Petitioners seek to replace the flexible and pragmatic approach this Court has followed in fashioning First Amendment procedural safeguards with a regime of "strict scrutiny." But this Court has never held that the fashioning of First Amendment procedural safeguards is subject to strict scrutiny – or, for that matter, to *any* of the forms of scrutiny that the Court has held to be applicable to the review of *substantive burdens* on speech.[2]

Rather, when this Court has spoken of First

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[2] Nor has the Court viewed the fashioning of First Amendment procedural safeguards as turning upon the particular standard that would apply to a substantive restriction on the kind of speech at issue. *See Southeastern Promotions*, 420 U.S. at 562 ("The procedural shortcomings that form the basis for our decision are unrelated to the standard that the board applied .... The standard, whatever it may be, must be implemented under a system that [affords adequate procedural protections].")

Amendment "scrutiny" – whether strict, intermediate, or of some other form – what the Court has subjected to scrutiny has been a *burden* that the government proposes to place on particular kind of speech; and the mode of scrutiny, whether strict[3] or otherwise,[4] has been calculat-

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[3] *See, e.g., Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011) (applying strict scrutiny to a "restriction" on the content of protected speech); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011) (same with regard to "[l]aws that burden political speech"); *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (same); *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (noting that strict scrutiny applies to a "restriction" based on the content of the speech); *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009) (same with regard to content-based "[r]estrictions" on speech); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (same with regard to a law that "burdens" political speech); *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004) (same with regard to a content-based "restriction"); *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002) (same with regard to a "restriction" on political speech); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) (same with regard to a content-based speech "restriction") *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (same with regard to a "limitation on political expression"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (same with regard to a "state-imposed restriction" on speech); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 582 (2000) (applying strict scrutiny to election regulations that placed a "heav[y] burden on a political party's associational freedom"); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (noting that strict scrutiny applies to regulations that force a group to accept an unwanted member whose presence significantly impairs the ability of the group to express its views); *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (applying strict scrutiny to a "significant impairment" of association rights); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990) (applying strict scrutiny to "penalties" for the exercise of associational rights).

[4] *See, e.g., Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339-40 (2010) (applying "less exacting scrutiny" to commercial disclosure requirements that "reasonably related to the [Government's] interest in preventing deception of consumers");

Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 452-58 (2008) (holding that a statute imposing "modest burdens" on associational rights will survive First Amendment scrutiny if it advances "important regulatory interests" with "reasonable, nondiscriminatory restrictions"); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 534, 553-67 (2001) (holding that "restrictions on outdoor advertising, point-of-sale advertising, [and] promotions" for tobacco companies are subject to scrutiny under standard for "commercial speech," requiring that the regulation "directly advances" a "substantial" governmental interest and that the regulation "is not more extensive than is necessary to serve that interest"); *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683-85 (1992) (holding that "restrictions" on distribution of literature and solicitation of contributions in airport terminals that are not public fora "need only satisfy a requirement of reasonableness"); *Ward v. Rock Against Racism*, 491 U.S. 781, 791-803 (1989) (holding that "in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech," provided that such restrictions are content-neutral, are "narrowly tailored to serve a significant governmental interest," and "leave open ample alternative channels for communication of the information"); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-55 (1986) (holding that zoning restrictions on adult-oriented businesses are subject to intermediate scrutiny that is satisfied if the zoning ordinance "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication"); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (holding that governmental action that punishes public-employee speech on matters of public concern is subject to an intermediate form of scrutiny that "balance[s] between the interests of the [employee], as a citizen. . . and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees"); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (holding a regulation on conduct that entails "incidental limitations on First Amendment freedoms . . . is sufficiently justified if . . . it furthers an important or substantial governmental interest; if the governmental is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest"); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662-68 (1994) (applying *O'Brien* standard to law requiring cable television providers to carry local broadcast stations).

ed to assess whether that burden bears a sufficient relationship to an appropriate governmental interest.

Indeed, the demands of strict scrutiny – *i.e.*, showing that a regulation "furthers a compelling interest and is narrowly tailored to achieve that interest," *Citizens United v. FEC*, 130 S.Ct. 876, 898 (2010) (citation and quotation marks omitted) – only make sense as applied to substantive burdens on speech or association, *not* as applied to "procedural safeguards" of speech, *Hudson* 475 U.S. at 303. To require that a regulation advances a "compelling" governmental interest presupposes that the governmental interest works at cross-purposes with free-speech rights, so the inquiry ensures that there is, not just an "actual problem in need of solving," but one of sufficiently grave importance that "the curtailment of free speech must be actually necessary to the solution." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011) (citations and quotation marks omitted). The requirement of narrow tailoring acts in complementary fashion to minimize any substantive interference with free-speech rights by demanding that a regulation "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). By the same token, "the compelling-interest test may be one analytical device to detect, in an objective way, whether the asserted justification [for a burden on speech] is in fact an accurate description of the purpose and effect of the law." *Burson v. Freeman*, 504 U.S. 191, 213 (1992) (Kennedy, J., concurring).[6]

Courts cannot and do not "scrutinize" *procedural safeguards* of First Amendment rights as they scrutinize *sub-*

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[6] *See generally Davenport*, 551 U.S. at 188 (discussing strict scrutiny as a means of evaluating the risk that a content-based restriction on speech may have a viewpoint-discriminatory impact).

stantive burdens that the government seeks to impose on those rights. Petitioners' contention that the adoption of procedural protections as called for by *Hudson* is subject to "strict scrutiny" is thus an attempt to fit a square peg into a round hole. And more than that, it is an attempt to foreclose consideration of the kinds of competing considerations – "the cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase," *Waters*, 511 U.S. at 671 (plurality opinion) – that have always guided the Court in its assessment of procedures that are proposed to be required as safeguards for First Amendment interests.

There is no basis for Petitioners' contention that in agency fee cases, unlike other First Amendment cases, procedural safeguards should be assessed through a lens of strict scrutiny. Rather, *Abood* and *Hudson* are fully consistent with the broad stream of First Amendment jurisprudence in holding that any determination of the procedures a union must provide in its agency fee system to protect the rights of objecting feepayers must be guided by a *dual* objective: "to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the union's ability to require every employee to contribute to the cost of collective-bargaining activities." *See supra* at 7-8.

The Brief for Respondent amply demonstrates that the procedures followed by the union in this case comported fully with that objective. No "scrutiny" that would suggest otherwise could be squared with *Hudson*, or with fifty years of union fee jurisprudence in this Court, or with the principles the Court consistently has brought to bear in fashioning procedural safeguards in other First Amendment contexts.

CONCLUSION

If the Court reaches the merits, it should affirm the decision of the Ninth Circuit.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

ECORD
AND
BRIEFS

No. 10-1121

In the

Supreme Court of the United States

◆

DIANNE KNOX, *et al.*,
Petitioners,
v.
SERVICE EMPLOYEES
INTERNATIONAL UNION, LOCAL 1000,
Respondent.

◆

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

◆

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, MOUNTAIN STATES LEGAL FOUNDATION, AND CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. In *Teachers Local No. 1 v. Hudson*, this Court held that "[b]asic considerations of fairness, as well as concern for the First-Amendment rights at stake, ... dictate that the potential objectors be given sufficient information to gauge the propriety of the union's [agency] fee" extracted from nonunion public employees. 475 U.S. 292, 306 (1986).

May a State, consistent with the First and Fourteenth Amendments, condition employment on the payment of a special union assessment intended solely for political and ideological expenditures without first providing a *Hudson* notice that includes information about that assessment and provides an opportunity to object to its exaction?

2. In *Lehnert v. Ferris Faculty Ass'n*, this Court held that "the State constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation." 500 U.S. 507, 522 (1991) (opinion of Blackmun, J.); *accord id.* at 559 (opinion of Scalia, J.) (concurring as to "the challenged lobbying expenses").

May a State, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of union agency fees for purposes of financing political expenditures for ballot measures?

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation, the Center for Constitutional Jurisprudence, Mountain States Legal Foundation, and the Cato Institute respectfully submit this brief amicus curiae in support of Petitioners.[1]

Pacific Legal Foundation (PLF) was founded over 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the right of workers not to be compelled to make involuntary payments to support political or expressive purposes with which they disagree. To that end, PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 906 P.2d 1242 (Cal. 1995); and *Cumero v. Pub. Employment Relations Bd.*, 778 P.2d 174 (Cal. 1989), and PLF has participated as amicus curiae in all of the most important cases involving labor unions compelling workers to support political speech, from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007).

The Center for Constitutional Jurisprudence was founded in 1999 as the public interest law arm of the Claremont Institute, the mission of which is dedicated to upholding the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition that compelled speech and political participation is as much an affront to the First Amendment as are restrictions on speech and political participation. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *United States v. Morrison*, 529 U.S. 598 (2000); and *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Mountain States Legal Foundation is a nonprofit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preparation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state of the nation. Since its inception in 1977, MSLF and its attorneys have engaged in litigation to protect the individual right to freedom of speech to support whatever political party, cause, or candidate that individual chooses without interference. MSLF has also been engaged in litigation to oppose state-compelled political speech through the imposition of union agency fees on nonmembers to support political causes with which they disagree, thereby subverting the political process itself. *See, e.g.*, *Mountain States Legal Found. v. Denver Sch. Dist. No. 1*, 459 F. Supp. 357 (D. Colo. 1978); *Campbell v. Arapahoe County Sch. Dist.*, 90 F.R.D. 189 (D. Colo.

1981); *Campbell v. Joint Dist. 28-J*, 704 F.2d 501 (10th Cir. 1983); *Mountain States Legal Found. v. Office of the Sec'y of State, State of Colo.*, 946 P.2d 586 (Colo. App. 1997); and *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007) (amicus curiae).

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs. This case is of central concern to Cato because it implicates so many individual rights, including speech, property, and choice of employment.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners represent 28,000 current and former California state employees who do not belong to the recognized bargaining representative, Service Employees International Union, Local 1000. *Knox v. California State Employees Ass'n, Local 1000*, 628 F.3d 1115, 1124 (9th Cir. 2010). The nonmembers are required to pay to the union a "fair share fee" in lieu of union dues, to defray the union's costs regarding collective bargaining. In June, 2005, the union sent out its annual *Hudson* notice setting out the union's finances and giving employees 30 days in which to object to the calculation of the fair share fee. *Id.* at 1118.

Shortly after the time for objection expired, the union sent out a second notice, announcing that a new fee would be taken from state employees' paychecks, to fund the "Emergency Temporary Assessment to Build a Political Fight-Back Fund." *Id.* This fund was specifically designated to be used for a broad range of political expenses, including advertisements advocating the defeat of two ballot initiatives related to California's overall budget. The state Controller began paycheck deductions in September, 2005, and the deductions continued for about a year, constituting a 25%-33% increase over the deduction stated in the June *Hudson* notice. *Id.* at 1129-30 (Wallace, J., dissenting).

Cases in which labor unions deduct money—whether dues or agency shop fees—from workers' paychecks and spend the money on political activities implicate important issues of free speech, freedom of association, and freedom of choice. Labor unions often complain that restricting their access to such monies diminishes their effectiveness and imposes substantial hardships on them. But this Court's focus should not be on the difficulties faced by unions when the law compels them to ask permission from workers before taking their money. Instead, the focus must be on the freedom of choice of individual workers. *Cf. Davenport*, 551 U.S. at 187 (emphasis added) ("For purposes of the First Amendment, it is entirely immaterial that [a law] restricts a union's use of funds only after those funds are already within the union's lawful possession . . . . What matters is . . . the union's extraordinary *state* entitlement to acquire and spend *other people's* money.").

Given the substantial disadvantage dissenting workers face when dealing with the social, legal, and political institutions governing organized labor, this

Court must above all act to protect dissenting individual workers from a system that exploits them and violates their rights of property, expression, and choice.

ARGUMENT

I

WORKERS' FREEDOM TO CHOOSE HOW THEIR EARNINGS ARE SPENT SHOULD GUIDE THIS COURT'S ANALYSIS

The most important part of freedom of expression is the right not to conform. It is relatively easy to create an enforced unity through political, legal, and social pressures, but the nonconformist must rely on the Constitution for protection. *See, e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). To differ, or to refuse to support speakers or campaigns with which one disagrees, is often a lonely and courageous act, more in need of legal security than the right to join or to support an organization or movement. Dissent is by definition counter-majoritarian, which means that dissenters need the protection of institutions that shield them from majoritarian political processes. *See, e.g.*, Cass R. Sunstein, *Why Societies Need Dissent* 98 (2003) ("[A]t its core, [the First Amendment] is designed to protect political disagreement and dissent.").

This Court has long recognized that the freedom of expression guaranteed by the First Amendment protects choice in "the decision of both what to say and what not to say," *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 782 (1988), and for that reason has repeatedly upheld the principle that people have the right to refrain from subsidizing messages with which they disagree. *See, e.g.*, *United States v.*

United Foods, Inc., 533 U.S. 405, 410 (2001); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). In many cases, the Court has recognized that it would violate the First Amendment for workers' earnings to be taken by the state, and transferred to labor unions for use in promoting political messages with which the workers disagree. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991); *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988); *Abood*, 431 U.S. at 244. *See also Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1253 (6th Cir. 1997) (citation omitted) ("[T]he right not to contribute to political causes that they do not favor is as central a First Amendment right as is the right to solicit funds. The protection of this right is certainly at least 'important or substantial,' if not compelling.").

Moreover, the judiciary has a special duty to intercede on behalf of political minorities who cannot hope for protection from the majoritarian political process. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982). Workers who disagree with the political views of labor unions are in precisely this situation, and this Court must therefore focus principally on protecting the right of workers to determine how their earnings—essential both to their private property as well as their expressive rights—will be spent.

This Court has routinely recognized the central importance of choice in the context of union workers free speech rights. When a state union compels its workers to make contributions for political purposes, it is "an infringement of their constitutional rights." *Abood*, 431 U.S. at 234. Given that the right at issue is the freedom of political expression, which this Court regards as a fundamental right subject to strict scrutiny, the Court should be particularly keen to preserve individual freedom of choice in cases involving the compulsory support of labor union activities. "To preserve the protection of the Bill of Rights for hardpressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." *Glasser v. United States*, 315 U.S. 60, 70 (1942). Among other reasons for presuming against such a waiver are that the opposite presumption, or a scrutiny less than strict, could too easily blind courts to subtle coercion, or might allow workers, accidentally or through ignorance or duress, to waive vital constitutional liberties. Thus the analysis in all union fees/expression cases must begin with and follow the expressive rights of individual workers.

In *Davenport*, this Court reinforced the central place of worker choice in cases involving compulsory union support. Giving a private entity—the labor union—"the power, in essence, to tax government employees," was "unusual," the Court noted, 551 U.S. at 184, and the First Amendment would allow a state to "eliminate . . . entirely" the "extraordinary benefit" of allowing the union to take money from the paychecks of workers to support union activities. *Id.* Moreover, the Court repeatedly emphasized that states have broad discretion to tailor this "benefit" so long as they do so in a manner that is above the "constitutional floor" established by cases like *Beck*, *Hudson*, and *Abood*. *Id.* at 185. In *Davenport*, which assessed the constitutionality of Washington's "paycheck protection" statute that required workers' consent before unions could garnish their wages to fund political activities, the state had established a constitutionally permissible mechanism to protect individual rights, given "the union's extraordinary *state*[-granted] entitlement to acquire and spend *other people's* money." *Id.* at 187. Thus the constitutional validity of the union's procedure in this case should be judged by reference to the worker's constitutional right to be free from compelled speech.

II

UNIONS USE A VARIETY OF LEGAL TACTICS, PERSONAL PRESSURES, AND THREATS TO VIOLATE THE RIGHTS OF WORKERS

A. Unions Have a Long History of Violating the First Amendment by Compelling Workers To Support Speech with Which They Disagree

Unions rely heavily on peer pressure, intimidation, coercion, and inertia to prevent dissenting members or nonmembers from opposing union political activities. *See* Joe Knollenberg, *The Changing of the Guard: Republicans Take on Labor and the Use of Mandatory Dues or Fees for Political Purposes*, 35 Harv. J. on Legis. 347, 364 (1998) (Dues objectors are likely to find the path of dissent "marked by threats of life and family, intimidation, insults and coercion."); Linda Chavez & Daniel Gray, *Betrayal: How Union Bosses Shake Down Their Members and Corrupt American Politics* 44-46 (2004). Workers often feel either compelled to join the union, or to stifle their beliefs, lest their disagreement incur retaliation by union leaders or coworkers. As this Court recognizes, it is particularly important to enforce First Amendment protections in environments where heavy peer pressure might otherwise prevent the free expression of ideas. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (citations omitted) ("[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means.").

Dissenting workers in offices where public employee unions have substantial power to govern the terms of employment and even to deduct funds from the paychecks of nonmembers, are particularly in need of constitutional protections. Rules governing public employee unions differ from state to state, but they are usually quite distinct from the rules that govern unions in the private sector. *See* Harvard Law Review Ass'n, *Collective Bargaining in the Public Sector*, 97 Harv. L. Rev. 1676 (1984). Given government's monopolistic status, public employee unions are in a unique position to exploit workers who have less freedom to choose alternative employers or alternative union representation. This monopoly position also means that public employee unions are likely to exert more coercion and intimidation against dissenting workers than are private sector workers, given the fact that such workers cannot readily find similar jobs in the private sector. *See, e.g.*, *Martel v. Dep't of Transp., FAA*, 735 F.2d 504, 509-10 (Fed. Cir. 1984) (employee of FAA was intimidated by union members into joining strike); *Ferrando v. Dep't of Transp., FAA*, 771 F.2d 489, 492-93 (Fed. Cir. 1985) (noting that FAA union would "monitor[ ] the work of non-participating [workers] and report[ ], and even invent[ ], infractions until the [worker] lost his job or was suspended"). Public employee unions are also in a uniquely powerful position to influence the adoption of public policies, John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 Wm. & Mary L. Rev. 365, 463 (1999), which means that government workers dissatisfied with the policies of a union have less ability to obtain redress in the political arena than do their counterparts in the private sector.

Most disturbing of all, public employee unions—unlike their private-sector counterparts—are exempt from the Labor-Management Reporting & Disclosure Act (LMDRA), 29 U.S.C. §§ 401, *et seq.*, 73 Stat. 519 (1959), the primary federal mechanism for policing the abuses of organized labor. Under LMDRA, unions are required to file financial reports with the government disclosing how they spend their money, but the statute excludes public employee unions. 29 U.S.C. § 402(e); *Brock v. Southern Region, Region III of the Civil Service Employees Association, Inc.*, 808 F.2d 228, 231 n.3 (2d Cir. 1987).

The political atmosphere of the unionized workplace puts an extremely heavy burden on workers to join the union or remain silent about their own opposition to union policies. The history of unionism is replete with examples of threats, coercion, intimidation, and violence directed at workers who do not agree with union goals, policies, or tactics. *See generally* Chavez & Gray, *supra*, at 44-46; Herbert R. Northrup, *The Teamsters' Union Attempt to Organize Overnite Transportation Company: A Study of a Major Union Failure*, 30 Transp. L.J. 127, 155-68 (2003).[2] Precise statistics are hard to come by, since much—perhaps most—union violence is not reported, *id.* at 155, but the National Institute for Labor Relations Research (NILRR) maintains a database of union violence and counted more than 9,000 incidents from 1975 to 2008—only 258 (less than 3%) of which led to convictions. *See* NILRR, *Violence Event Data File.*[3] Short of violence, unions use intimidation, peer pressure, and threats to push workers into contributing to union efforts, or at least remaining silent about their opposition to them. In fact, a search of the NLRB's own online database reveals that in just the years between 2000 and 2007, workers brought 1,325 complaints to the NLRB alleging that the unions had made threatening statements to them, 546 complaints of harassment, and 416 complaints of "violence/assaults." *See* Center for Union Facts, *When Voting Isn't Private: The Union Campaign Against Secret Ballot Elections* 19 (2007).[4]

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[2] Union violence is frequently immune from prosecution under anti-racketeering laws. *United States v. Enmons*, 410 U.S. 396, 410 (1973).

[3] *Available at* http://www.nilrr.org/node/54 (last visited Sept. 1, 2011).

Among other things, unions routinely use high-pressure tactics to manipulate workers into contributing money for union political campaigning. In case after case, federal courts have been required to intercede to protect the rights of dissenting workers who do not want their money taken from them to support union political activities. *See, e.g.*, *Lutz v. Int'l Ass'n of Machinists & Aerospace Workers*, 121 F. Supp. 2d 498, 506 (E.D. Va. 2000); *Penrod v. NLRB*, 203 F.3d 41, 46 (D.C. Cir. 2000); *Tavernor v. Ill. Fed'n of Teachers*, 226 F.3d 842, 851 (7th Cir. 2000); *Shea v. Int'l Ass'n of Machinists & Aerospace Workers*, 154 F.3d 508, 515 (5th Cir. 1998); *Damiano v. Matish*, 830 F.2d 1363, 1370-71 (6th Cir. 1987). Yet unions continue to drag their feet, fail to inform workers about their rights under *Beck* and other cases, and intimidate workers into paying to support political activism by the unions contrary to their actual desires. In *Davenport*, for example, after the State of Washington enacted a provision requiring a public employee union to obtain consent from workers before taking their money to pay for political activities, the union saw the amount of monies contributed for such activities drop by some 85%. Bob Williams, *WEA-PAC Donations Drying Up:*

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[4] *Available at* http://www.unionfacts.com/downloads/report.cardCheck.pdf (last visited Sept. 1, 2011).

Teachers Taking Their Political Dollars Elsewhere, Evergreen Freedom Foundation, (July 6, 1998).[5] Similarly, in Indiana, Gov. Mitch Daniels signed an executive order limiting collective bargaining for state workers resulting in a reduction in the number of union members from 16,408 in 2005, when Daniels signed the order, to 1,490 today. Katrina Trinko, *Opting Out of Unionization*, National Review Online (Apr. 13, 2011).[6] These numbers indicate the degree to which union members acquiesce in the violation of their expressive rights thanks to the peer pressure, intimidation, and dilatory tactics of labor unions.

Labor unions spend as much as $800 million per year on political campaigns, more than both the Republican and Democratic parties combined. Chavez & Gray, *supra*, at 29. The exact amount is hard to substantiate, however, because unions take pains to conceal the actual figures. Just one union—the SEIU —spent $33,083,433.20 in independent expenditures targeted at the 2008 presidential election. Federal Election Commission, Summary Report of Independent

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[5] The union responded by successfully urging the Washington legislature to amend the statute to declare that the union can "spend freely as long as enough money remains to refund nonmembers . . . . The Washington legislature endorsed an accounting of complete fungibility, with no accountability on the WEA's part to trace sources of income to nonmember agency fees." Daniel A. Himebaugh, *Consider the Source: A Note on Public-Sector Union Expenditure Restrictions Upheld in* Davenport v. Washington Education Association, 28 J. Nat'l Ass'n L. Jud. 533, 569 (2008) (describing amendment to Wash. Rev. Code Ann. § 42.17.760).

[6] *Available at* http://www.nationalreview.com/articles/264545/opting-out-unionization-katrina-trinko# (last visited Sept. 1, 2011) (also noting the number of union members donating to the political arm of the Utah Education Association decreased from 68% to 6.8% after that state enacted paycheck protection).

Expenditures for the 2008 Presidential Campaigns. According to filings made to the California Secretary of State, the SEIU also spent just under $2 million in California political contributions.[8] These, of course, represent the expenditures of a single union—the total amount of dollars spent on politicking by all unions combined is exponentially more.[9]

These contributions are often made contrary to the views of the workers themselves. Frank Luntz polled 760 union members in October, 2010, and found that 60% opposed their union's political spending in that year's midterm elections, viewing it a wasteful use of union dues and treasuries to protect incumbent Democrat politicians in Washington, D.C.[10] This gibes with a 1996 poll that revealed that 62% of union members opposed the AFL-CIO's decision to spend $35 million purchasing advertisements promoting the Democratic party. Chavez & Gray, *supra*, at 45. In fact, polls show that more than 40% of union members

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[7] *Available at* http://www.fec.gov/press/press2008/2008indexp/2008iebycommittee.pdf (last visited Sept. 1, 2011).

[8] *Available at http*://cal-access.sos.ca.gov/Campaign/Committees (last visited Sept. 1, 2011).

[9] *See* Brody Mullins & John D. McKinnon, *Campaign's Big Spender*, Wall St. J. (Oct. 22, 2010) (noting that the American Federation of State, County and Municipal Employees ranked first among spenders on the 2010 elections, spending $87.5 million on television advertisements, phone calls, campaign mailings, and other political efforts). *Available at* http://online.wsj.com/article/SB10001424052702303339504575566481761790288.html (last visited Sept. 1, 2011).

[10] The Word Doctors, *Benchmark Study of Union Employee Election Year Attitudes* (Oct. 2010), *available at* http://www.nrtw.org/files/nrtw/Luntz_NRTW_Union_Member_Survey_Oct2010.pdf (last visited Sept. 1, 2011).

vote Republican. Nate Silver, *The Effects of Union Membership on Democratic Voting*, The New York Times (Feb. 26, 2011),[11] yet unions' political expenditures "overwhelmingly support" the Democratic party and candidates. *See* Open Secrets, Public Sector Unions (2011-2012).[12] This dissonance between union workers and their leadership leads to serious abuses when unions are empowered to seize workers' earnings and put them to use in political causes which the workers do not support. Of course, it makes no difference whether the beneficiary of the unions' largesse is the Democratic Party, the Republicans, Libertarians, or the Greens—the key constitutional principle remains constant regardless of the political goals sought.

B. Workers Are Being Denied the Protections Promised by This Court's Rulings in Dues and Fees Cases

This Court has consistently held that labor unions may not use dues or agency shop fees to support political campaigns which workers do not wish to support. *See Abood*, 431 U.S. at 235; *Beck*, 487 U.S. at 745; *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 301-02 (1986); *Lehnert*, 500 U.S. at 522. Yet for decades, organized labor has engaged in a campaign of "massive resistance" against these decisions, consciously refusing to follow their mandates of these cases, or tailoring their responses to obstruct and frustrate the implementation of workers' rights. *See generally* Harry

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[11] *Available at* http://fivethirtyeight.blogs.nytimes.com/2011/02/26/the-effects-of-union-membership-on-democratic-voting/ (last visited Sept. 1, 2011).

[12] *Available at* http://www.opensecrets.org/industries/ indus.php?ind=p04 (last visited Sept. 1, 2011).

G. Hutchison, *Reclaiming the First Amendment Through Union Dues Restrictions?*, 10 U. Pa. J. Bus. & Emp. L. 663 (2008); Jeff Canfield, *What a Sham(e): The Broken Beck Rights System in the Real World Workplace*, 47 Wayne L. Rev. 1049 (2001); Brian J. Woldow, *The NLRB's (Slowly) Developing Beck Jurisprudence: Defending a Right in a Politicized Agency*, 52 Admin. L. Rev. 1075 (2000) (documenting refusal of unions and government to abide by *Beck* and similar cases). *See also Monson Trucking Inc.* [*v.*] *Anderson*, 324 N.L.R.B. 933, 935 (1997) (union failed to provide employee *Beck* rights notice); *Chauffeurs, Teamsters, Warehousemen & Helpers Union, Local No. 377*, [*v.*] *Blanchard*, Case No. 8-CB-9415-1, 2004 NLRB LEXIS 57, *14 (N.L.R.B. Feb. 11, 2004) ("I find that the membership application with the 'Notice' hidden on the second and third page did not serve to adequately apprise newly-hired employees of their *Beck* rights.").

Even the National Labor Relations Board has been criticized for participating in the unions' campaign of resistance toward worker rights established in *Beck*, *Abood*, and *Hudson*. *Cf. NLRB v. Ancor Concepts, Inc.*, 166 F.3d 55, 59 (2d Cir. 1999) ("[T]he Board stands out as a federal administrative agency which has been rebuked before for what must strike anyone as a cavalier disdain for the hardships it is causing."). The NLRB has adopted delay tactics so extreme that some cases asserting workers' rights under *Beck*, *Hudson*, and *Abood* have waited nearly a decade for resolution. *See, e.g.*, *Am. Fed'n of Television & Recording Artists* [*v.*] *Weissbach*, 327 N.L.R.B. 474, 476 (1999) (challenging 1989 expenditures). Only in 1995 did the NLRB first apply the 1988 *Beck* decision, in *Cal. Saw & Knife Works* [*v.*] *Podchernikoff*, 320 N.L.R.B. 224, 224 (1995), a case in which the NLRB determined that when workers demand an audit detailing how much of their money is spent on political campaigning, they are entitled only to the union's in-house audit, and not an independent audit. The District of Columbia Circuit later called this ruling inconsistent with "any rational interpretation" of "*Hudson*'s 'basic considerations of fairness' language." *Ferriso v. NLRB*, 125 F.3d 865, 869 (D.C. Cir. 1997).

Given the politically weak positions of dissenting workers, the pervasive abuses of unions, the lack of protection in administrative agencies, and the fundamental importance of the expressive and associative rights at issue, protecting the individual's freedom to choose—and to dissent—in the environment of the unionized workplace must be the guiding principle in this case. *See also* Harry G. Hutchison, *Diversity, Tolerance, and Human Rights: The Future of Labor Unions and the Union Dues Dispute*, 49 Wayne L. Rev. 705, 717 (2003) (The "proper mooring" of "the union dues dispute" is "freedom of conscience."). At a minimum, the union was constitutionally required to provide the *Hudson* notice prior to the mid-year garnishment of wages for a political campaign.

III

IN LIGHT OF UNIONS' DISREGARD FOR DISSENTING WORKERS' RIGHTS, THE COURT SHOULD HOLD THAT THE CONSTITUTION DEMANDS THAT WORKERS "OPT-IN" PRIOR TO ANY GARNISHMENT OF THEIR WAGES

As discussed above, the most narrow holding this Court could offer in this case is to require the *Hudson* notice before mid-year garnishment of wages for political purposes. But Amici believe the real-life consequences presented by this case justify a broader holding. This Court should hold as a matter of First

Amendment law that labor unions must obtain affirmative consent from workers *before* using expropriated funds for purposes of ideological speech or political campaigns. Although the Court has previously declared that it "is not to be presumed" that workers object to such exactions and expenditures. *Hudson*, 475 U.S. at 306 n.16 (quoting *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961) (presuming conformity, rather than dissent), recent history has demonstrated that unions are abusing their powers and spending both union dues and agency shop fees on ideological campaigns without fee payers' consent; are adopting refund procedures designed to deter dissent; and are engaged in a conscious campaign of "massive resistance" against this Court's worker-rights decisions, including *Hudson*, 475 U.S. 292; *Beck*, 487 U.S. 735, and *Abood*, 431 U.S. 209. This Court's position in *Abood* and other cases—that courts should not presume that workers object to the spending of their earnings on political campaigns—has not proved accurate in real world experience. The Court should reverse this position and hold that the Constitution requires a presumption that workers dissent, until the state or the union demonstrates otherwise.

A. The Court Should Adopt a Presumption of Dissent in Labor Union Compelled Speech Cases

This Court has stated that, although a worker cannot be compelled to support the promulgation of a political message with which she disagrees, nevertheless, a worker's "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." *Abood*, 431 U.S. at 238; *Hudson*, 475 U.S. at 306 n.16 (citation omitted). This conclusion should be corrected in light of subsequent experience with how the process has worked in the real world. First, it is inconsistent with the longstanding rule that laws infringing on free speech are presumptively invalid, and that individuals are not presumed to have waived fundamental rights. Second, it chills dissent which needs constitutional protection. Third, a presumption of dissent would be more consistent with a regime of free speech than the presumption of conformity inherent in the requirement that workers announce their dissent. Finally, abandoning the *Street* presumption of conformity would not implicate *stare decisis* concerns, because it originated in dicta, in cases involving statutory interpretation rather than the First Amendment.

1. Requiring Workers To Assert Dissent Is Inconsistent with the Strict Scrutiny Standard

The requirement that workers affirmatively make known their dissent, which originated in *Street*, 367 U.S. at 774, creates a presumption that workers wish to conform—a presumption which sits uneasily beside the long-standing rule that laws infringing fundamental rights are presumptively invalid. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973) ("[L]egislative judgments that interfere with fundamental constitutional rights . . . . [are] not entitled to the usual presumption of validity . . . [and] the State . . . must carry a 'heavy burden of justification.' "). The presumptive invalidity of laws limiting the freedom of speech means that when the law requires a worker to subsidize political activity, the state (or the union exercising state power) should bear the burden of justifying this law. The individual challenging such a scheme should not have that burden.

The presumption of conformity also violates the long-standing rule that courts "'do not presume acquiescence in the loss of fundamental rights.'" *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (quoting *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio*, 301 U.S. 292, 307 (1937)). This Court has repeatedly held that "[t]o preserve the protection of the Bill of Rights for hardpressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights," *Glasser*, 315 U.S. at 70. Among other reasons for presuming against such a waiver are that doing so would too easily blind courts to subtle coercion, or would too easily allow workers, accidentally or through ignorance, to waive vital constitutional liberties. Yet the presumption of conformity created by *Street* requires courts to assume that workers are willing to waive their right to stop their earnings from supporting political speech with which they disagree; that presumption threatens precisely the same harms.

The rule of strict scrutiny, which presumes that laws infringing on free speech are invalid, is based on the extreme importance of free speech in a system of participatory democracy. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). *See also Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (plurality opinion) ("[T]he First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems."). Requiring a worker to affirmatively make known her dissent from being forced to subsidize a union's political activities is to presume that the worker intends to waive that fundamental right, unless the contrary is proven. This inconsistency should not stand, especially given the importance of protecting a worker's right to dissent.

2. The Presumption That Workers Acquiesce in Supporting Unions Violates the Presumption of Liberty

Presumptions perform important roles in legal thinking: most especially, they allocate the risk of error in the most responsible way, and they protect important interests from disturbance in the absence of a compelling reason for changing the status quo. *See* Murl A. Larkin, *Presumptions*, 30 Hous. L. Rev. 241, 243-44 (1993). In criminal law, the presumption of innocence helps prevent the punishment of the innocent, although it may allow some of the guilty to go free. *In re Winship*, 397 U.S. 358, 363 (1970). Likewise, in the First Amendment context, the presumption against the constitutionality of laws infringing on freedom of expression is justified by the fact that more speech is to be preferred over less speech. *Cf. Texas v. Johnson*, 491 U.S. 397, 419 (1989) ("'[T]he remedy [for untruth] is more speech, not enforced silence.'" (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring))). *See also* Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 128 ("[T]he thumb of the Court [must] be on the speech side of the scales.").[13]

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[13] In *Davenport*, 551 U.S. at 187, this Court rejected the argument that a state constitutional mandate that demands an opt-in arrangement places a thumb on the "non-speech" side of scale so far as the unions' own speech rights are concerned: The paycheck protection statute "is not fairly described as a restriction on how

(continued...)

The text of the Constitution warrants a general presumption that individuals may act freely unless and until those seeking to limit their freedom provide convincing justification for doing so. *See generally* Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004). For example, the Fifth and Fourteenth Amendments prohibit government from "depriv[ing]" individuals of certain rights, and the First Amendment declares that the freedom of speech shall not be "abridged"—terms which imply that governmental authority must be regarded as secondary to, and limited by, the basic presumption that "in pursuing happiness, persons may do whatever is not justly prohibited." *Id.* at 268. Although the case was later overruled with regard to certain "non-fundamental" freedoms, the Court's words in *Adkins v. Children's Hosp. of the Dist. of Columbia*, 261 U.S. 525, 546 (1923), remain true with regard to free speech: Freedom, the Court said, is "the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances." *See also Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.").

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[13] (...continued)
the union can spend 'its' money; it is a condition placed upon the union's extraordinary *state* entitlement to acquire and spend *other people's* money."

One important reason courts should presume in favor of individual liberty until the state justifies its interference with that liberty is that individuals often are unable to articulate their reasons for exercising their liberty in certain ways. They may be intimidated, uneducated, or only partly aware of their own reasons. This does not mean that their actions fall outside the range of their legitimate freedoms. An artist, for example, may be unable to explain his work in precise language, yet his freedom of expression is not therefore less protected. Supporters of politically unpopular causes may not wish to disclose their identities or their reasons, out of fear of retaliation, or for other reasons. Yet the state may not require organizations to divulge the identities of its supporters when there are real risks of violence and other coercive pressures that can be brought to bear. *NAACP v. Patterson*, 357 U.S. 449, 462-63 (1958). Perhaps more to the point, to have a right means to be free to act or refrain from acting, without being required to give a reason. *See Lutz*, 121 F. Supp. 2d at 507 (describing the annual objection procedure as "analogous to a governmental pronouncement that a citizen who fails to cast a ballot on election day will be considered to have voted for a previously designated 'default' candidate. The law does not permit such an imposition of an unconstitutional default.").

Moreover, a presumption that a worker wishes to dissent is an appropriate background rule for deciding cases. In the relationship between the worker and the union, the original position is that the union may not take the worker's earnings. This Court has held that unions have no constitutional right to deduct dues or shop fees from workers' paychecks. *Beck*, 487 U.S. at 749-50; *see also Ky. Educators Pub. Affairs Council v. Ky. Registry of Election Fin.*, 677 F.2d 1125, 1134 (6th Cir. 1982) ("[The union] has no constitutional right to a check-off or payroll deduction system for political fund raising."). Any deviation from the original position must be justified by the party seeking to alter it, under the classic rule "*ei incumbit probatio qui dicit, non qui negat*" (i.e., "the burden is upon the one who asserts, not the one who denies"). *See further United States v. U.S. Gypsum Co.*, 67 F. Supp. 397, 446-48 (D.D.C. 1946), *overruled on other grounds*, 333 U.S. 364, 388 (1948); 1 Simon Greenleaf, *Evidence* § 74 at 103 (10th ed. 1860).

The party seeking to alter the *status quo* bears the burden of justifying such an alteration. *See* Anthony de Jasay, *Justice and Its Surroundings* 150-51 (2002). Here, this burden means that the union must provide justification for interfering with a worker's right to her pay. The Court has allowed states to alter the *status quo* in certain limited circumstances, by granting unions the privilege of deducting fees directly from nonmembers paychecks, but in the absence of justification, workers cannot be required to subsidize the union. A presumption of dissent parallels this basic logical schema.

3. Requiring Workers To Assert Objection Chills Dissent

It appears that the *Hudson* Court hoped to minimize the inconsistency between strict scrutiny and the *Street* presumption of conformity when it remarked that the burden on a worker is "simply" to make her objection known. *Hudson*, 475 U.S. at 306 n.16. But of course, this is precisely the burden that is indefensible, given this Court's refusal to presume that a person has waived her constitutional rights.

Nor is the *Street* requirement a "simple" matter. Given the pressure to conform that unions exert, as well as their record of violence against nonconforming workers, *see, e.g.*, Chavez & Gray, *supra*, at 139-58, it is often extremely difficult and even dangerous for dissenting workers to voice their objection to union policies. *Id.*; *see also* George C. Leef, *Free Choice for Workers: A History of the Right to Work Movement*, 38-40 (2005). Requiring workers affirmatively to assert their objections, instead of requiring unions to obtain consent from workers who support the union's efforts, only exacerbates the social pressure that chills dissent in the workplace. There is a constitutional dimension to this chilling effect, because, as this Court has recognized, government can employ a combination of state action and private action so as to pressure dissenters and violate essential First Amendment interests. In *Patterson*, 357 U.S. 449, the state tried "simply" to require the NAACP to disclose its membership lists. The Court recognized that there was nothing "simple" about it:

> [C]ompelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as . . . governmental action . . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in *American Communications Ass'n v. Douds*, [339 U.S. 382, 402 (1950)]: "A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature." Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. *Inviolability of privacy in group association*

> *may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.*

Id. at 462 (emphasis added). For similar reasons, requiring a worker to make her objections known requires a worker to draw attention to herself, and raises the possibility of retaliation and hostile treatment. Although an opt-in provision need not guarantee anonymity, it would help prevent the union from using a combination of government and social pressures to stifle dissident beliefs.

The *Patterson* Court cited Justices Douglas and Black's concurring opinion in *United States v. Rumely*, 345 U.S. 41, 57 (1953), as a further example of the combination of government and private action that can stifle freedom of speech. There, the Justices warned that requiring the press to identify its customers to the government on demand would lead to an alarming chilling of speech, because dissenters would "be subjected to harassment that in practical effect might be as serious as censorship." *Id.* Although "no legal sanction [was] involved" in the bookseller's refusal to disclose the information, "the potential restraint [was] . . . severe." *Id.*

Workers who do not wish to have their earnings taken from them to support political speech should not be forced to state their objections before exercising their right not to speak. Such a requirement forces dissidents to mark themselves for potential harassment and retaliation in a way that an "opt-in" requirement would not. Although workers who choose not to "opt-in" would not remain anonymous, the ability to make their decisions in private and register those decisions before a political campaign begins would protect them from the individual exposure and peer pressure that the current presumption of conformity enshrines. The current presumption stifles dissent and should be overruled.

4. Abandoning the Requirement That Workers Affirmatively Object to the Spending of Their Money on Political Campaigns Would Not Implicate *Stare Decisis*

a. The *Street* Presumption of Conformity Was Dicta

The presumption of conformity originated in dicta in *Street*, and would implicate *stare decisis* concerns only if *Abood* converted the dicta to a holding, which is by no means clear. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 626 (1935). *Street* was a statutory interpretation case, in which the Court held that the Railway Labor Act did not authorize unions to spend members' dues on political speech with which workers disagreed. The Court declared that "[t]he safeguards of [section] 2, Eleventh [of the Act] were added for the protection of dissenters' interest, but dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." 367 U.S. at 774. Thus the requirement of asserting an objection was statutory, not constitutional. *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Allen*, 373 U.S. 113, 119 (1963), was also a statutory interpretation case involving the Railway Labor Act.

In *Abood*, the Court appeared to recognize that the language in *Street* was dicta, when it held that workers are not required to identify with precision which political candidates and causes they wish not to support. *Abood*, 431 U.S. at 241. Such an exacting requirement "would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure," the Court noted. *Id.* "It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative." *Id.*

It was not until *Hudson* that this Court suggested that "the nonunion employee has the burden of raising an objection" as a constitutional matter (since *Hudson* was brought under the First and Fourteenth Amendments rather than the statute interpreted in *Street*), 475 U.S. at 306, but even this was not essential to the holding in *Hudson*, which was that the procedures adopted by the union for dealing with objections was unreasonably burdensome. *See id.* at 309. In fact, this Court has simply held that the Railway Labor Act requires a worker to assert her rights, and, in *Hudson*, adopted regrettably imprecise language suggesting that the First Amendment requires workers to assert their objections. This dicta warrants no *stare decisis* effect.

b. Even If the Presumption of Conformity Is a Rule of Law, It Should Be Overruled

Even if it is not dicta that workers must bear the burden of asserting their objections to the spending of their monies on political campaigns, this Court should overrule that requirement. "Unless inexorably commanded by statute, a procedural principle of this importance should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great." *Swift & Co., Inc. v. Wickham*, 382 U.S. 111, 116 (1965).

First, in the realm of constitutional interpretation, considerations of *stare decisis* are at their weakest. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). As the Court in *McLean Credit Union* noted, it is appropriate to overrule previous decisions when intervening changes have "removed or weakened the conceptual underpinnings from the prior decision." *Id.* at 173. This has happened with regard to the presumption of conformity created by *Street* and other cases: the unions' purposeful evasion of this Court's workers' rights decisions has proven that presumption to be unworkable.

In *Lawrence v. Texas*, 539 U.S. 558, 577 (2003), the Court held that it is appropriate to overrule a prior decision when it "does not withstand careful analysis," which the *Street* presumption does not. In addition, there has been no individual or social reliance on the presumption of conformity that would justify continuing to require workers to assert their objections rather than requiring unions to justify the taking of workers' earnings for political purposes. *Cf. id.* Many workers are unaware of the rules governing agency shop fees and union dues, and have no settled expectations with regard to them. While some unions have come to rely on the presumption of conformity, that reliance has led to abuse. Finally, in overruling a prior decision, the *Lawrence* Court found that the older case "itself cause[d] uncertainty, for the precedents before and after its issuance contradict its central holding." *Id.* The same can be said of the *Street* presumption. *Abood*, *Hudson*, and other cases have repeatedly found that labor unions have adopted burdensome procedures to restrict the rights of workers. In *Hudson*, 475 U.S. at 306 n.16, the Court sought to minimize the *Street* presumption, by declaring that it "simply" required a worker to assert an objection, which again demonstrates the essential unworkability of the presumption of conformity. And the Court found that the burden imposed by the union on workers asserting their objections was, indeed, too severe.

Considerations of *stare decisis* should not lead this Court to require workers to assert their objection to the taking of their earnings for the subsidizing of union political speech. The burden should rest with the union to obtain consent at the outset.

B. Procedural Due Process Cases Suggest the Kind of Protections This Court Should Adopt in Compelled Speech Cases

Requiring the union to obtain consent from workers before taking their earnings for political purposes is warranted by the presumption against the waiver of fundamental rights; by the strict scrutiny applied when state laws interfere with First Amendment rights; and by the principles of fundamental fairness protected by several other clauses of the Constitution. Cases addressing these other clauses offer useful guidance in this case as well.

1. When Taking Property or Liberty from Citizens, Due Process Requires a Pre-deprivation Procedure Whenever Feasible

When government intends to deprive a person of a liberty or property right or even a benefit, the Due Process Clause requires the government to observe certain procedures to ensure that the person has a fair opportunity to object, present her side of the story, and otherwise defend her interests. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this Court held that when government intends to terminate welfare benefits, it must accord the recipient a pre-termination hearing. Protecting persons against "grievous loss," *id.* at 263, is best effected by providing such a hearing, because the risk of erroneous deprivation outweighs the benefit to the state that would be gained by providing only a post-deprivation opportunity to be heard. *Id.* And that was in a case dealing with benefits provided by the government, not income actually earned by the employee as is at issue here.

In *Parratt v. Taylor*, 451 U.S. 527 (1981), this Court explained that a post-deprivation proceeding may satisfy the Due Process Clause when "the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process [is] coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial [deprivation]." *Id.* at 539. The Court emphasized that only "impracticability" would justify dispensing with a pre-deprivation hearing. *Id.* at 540. In *Parratt*, for example, the petitioner complained of the negligent loss of his toy model kit, which was a "random and unauthorized act by a state employee." *Id.* at 541. It was "difficult to conceive" of how the state could provide a pre-deprivation hearing to prevent such harm. *Id.*

Goldberg, *Mathews*, and *Parratt* require that, when the state proposes to take property, or even a government-provided benefit, it must provide a person with an opportunity to object *before* the deprivation, unless doing so would be "impracticable," *Parratt*, 451 U.S. at 541, or where some exigency requires speedy action by the state. *Id.* at 539. The state may also substitute a post-deprivation remedy when the burden on the state would be severe, and the risk of serious harm to the injured party is not significant. *Mathews*, 424 U.S. at 333.

Although the present case is not a Due Process case, these decisions provide useful guidance when determining whether the *Street* presumption of conformity satisfies the demands of the First Amendment. The risk of harm here is significant—as this Court recognized in *Hudson*, the First Amendment does not tolerate the risk that a worker's money might be used, even temporarily, to subsidize speech with which the worker disagrees. Only a minimal burden would be imposed on the state if unions are required to obtain consent from workers before spending such exactions on political campaigns. *Cf. Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435, 444 (1984) ("[A]lternatives, such as advance reduction of dues . . . place only the slightest additional burden, if any, on the union."); *Miller*, 103 F.3d at 1253 ("An annual mailing to a union's contributing members, asking them to check a box and to return the notice to the union, would seem to suffice under the statute."). And no exigency requires speedy action by the state. All of the reasons this Court has found to justify requiring *pre*-deprivation procedures are present in this case, militating in favor of requiring unions to obtain permission from workers *before* employing state power to take workers' earnings for funding political expression.

2. Requiring Workers To "Opt-in" Is the Most Effective "Concrete Constitutional Guideline" for Assuring Pre-deprivation Protection for Workers

The most efficient way to provide a worker with protection and to abide by basic considerations of fairness is to adopt an "opt-in" requirement. Employing a presumption of dissent, and thus requiring unions to obtain consent *before* spending workers' money on political expression, would be an effective, inexpensive concrete constitutional guideline protecting workers' rights.

This Court has a long history of requiring such prophylactic devices as a means of securing important individual rights. For example, the requirement established in *Miranda v. Arizona*, 384 U.S. 436 (1966), is a means of protecting the freedom from self-incrimination in an age of "modern custodial police interrogation." *Dickerson v. United States*, 530 U.S. 428, 434 (2000). In *Dickerson*, the Court affirmed *Miranda*'s prophylactic requirement as a constitutional rule ensuring against the violation of an arrestee's right against self-incrimination. "[T]he advent of modern custodial police interrogation," the Court found, "brought with it an increased concern about confessions obtained by coercion," *Dickerson*, 530 U.S. at 434-35. This heightened risk of Fifth Amendment violations warranted the implementation of "'concrete constitutional guidelines for law enforcement agencies and courts to follow.'" *Id.* at 435 (quoting *Miranda*, 384 U.S. at 442).

A similar situation is presented here. Allowing unions with the active logistical support of the state to adopt post-deprivation remedies, such as administrative hearings and rebates, has not succeeded in protecting the rights of workers. The advent of modern union funding—through direct paycheck deductions, as opposed to requiring overt payment by a worker—as well as the conscious effort by unions to evade the requirements of this Court's decisions, bring with them an increased "risk that [dissenters'] funds will be used, even temporarily, to finance ideological activities" with which they disagree. *Abood*, 431 U.S. at 244. The Court should adopt a concrete constitutional guideline for unions and states to follow which will prevent violations of workers' First Amendment right not to subsidize union political activities.

The simplest and most efficient guideline available is to require unions to obtain affirmative consent from workers before taking their money for political activity. In *Miller*, 103 F.3d at 1253, the Sixth Circuit rejected a union's challenge to an "opt-in" requirement, pointing out that it served an important state interest in protecting the rights of the dissenting minority, and ensuring "that political contributions are in accordance with the wishes of the contributors." 103 F.3d at 1253. Moreover, the Court found that it "border[ed] on the frivolous" to claim that requiring workers to consent would impose a severe burden on the union. *Id.* at 1253. More importantly, whatever burden it imposes on the union is well justified, because it is the union that seeks to take the workers' funds for political purposes. It is legitimate to require it to bear the burden of assuring that it does so in a constitutional manner.

◆

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be *reversed.*

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Respectfully submitted,

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